No. 14-24-00818-CR

In the Fourteenth Court of Appeals
Houston, Texas

MARCOS GOMEZ ABAD,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 177th Judicial District Court
Harris County, Texas
Robert Johnson, Judge Presiding
In Cause No. 1629708

APPELLANT'S OPENING BRIEF

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To the Honorable Court of Appeals:

Jury unanimity is a fundamental feature of the criminal justice system. It's guaranteed by the United States Constitution, the Texas Constitution, and the Texas Code of Criminal Procedure. It protects the right to a jury trial. It safeguards the right not to be convicted except upon proof beyond a reasonable doubt. The unanimous jury is the voice of the community, the finder of facts, and the bulwark of liberty and justice. And it was denied to Marcos. This Court should give him a new trial.

STATEMENT OF THE CASE

Marcos Abad was indicted for sexual assault.[1] Tex. Penal Code § 22.011(a)(2)(A). He pleaded not guilty, but a jury convicted him.[2] The trial court found true that Marcos had previously been placed on deferred adjudication for indecency with a child, triggering an automatic life sentence, which the court pronounced.[3] Tex. Penal Code § 12.42(c)(2)(A)(i), (B)(ii), (g)(1). This appeal follows.

[1] Clerk's Record (CR):26; Reporter's Record volume (RR) 3:8.

[2] CR:750, 793, 795; RR3:9; RR5:28–29.

[3] CR:753, 795; RR5:57.

Issues Presented

1. **Unanimity.** The State presented evidence of two discrete incidents of penis-to-vagina sexual assault, which was the charged offense, but the court did not instruct the jury that they must be unanimous as to which specific incident Marcos was guilty of. Was this error egregiously harmful?

2. **Judgment Reformation.** The judgment improperly assesses a fine, fails to state the statute of the offense, and assesses unsupported fees. Should this Court modify the judgment to correct these errors?

3. **Bill of Costs.** The bill of costs makes payable now costs that the court ordered to be paid later, and it also includes an illegal fine and unsupported fee assessments. Should this Court modify the bill of costs to correct these errors?

STATEMENT OF FACTS

Marcos moves in with KM's mother.

PL, KM's mother, began dating Marcos Abad in late 2018 or early 2019 after meeting him on a dating app.[4] After a couple of months, he moved in with PL and her children.[5] KM and Marcos had a "very rocky" relationship, and Marcos knew that KM "did not want him there."[6]

The family discovers that Marcos is a registered sex offender.

PL inquired about Marcos's past, and he eventually told her that he was a registered sex offender.[7] She confirmed this by looking him up on the Texas Sex Offender Registry.[8] He told her that the accusations stemmed from a "bitter divorce."[9]

Court records showed that Marcos had pleaded guilty to indecency with a child in Grimes County and received deferred adjudication community supervision.[10] PL never noticed Marcos "being touchy with" KM or anything else that gave her concern.[11]

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[4] RR4:10–14.

[5] RR4:14–15, 64.

[6] RR4:65.

[7] RR4:16–17.

[8] RR4:18; SX7.

[9] RR4:18–19.

[10] RR4:19–21; SX6.

[11] RR4:22–23.

KM learned separately from PL's sister that Marcos was a registered sex offender.[12] KM called the police, who came out and "asked for his ID" but also confirmed that there were no restrictions on his being around children.[13]

KM accuses Marcos of sexual assault.

On Saturday, April 27, 2019, PL and KM went dress shopping and then to a performance by Marcos's "cousin's daughter."[14] KM was 14 years old.[15] While they were out, Marcos had cleaned the kitchen and made hamburgers.[16] He was drunk when they got home, and PL noticed that the hamburgers were undercooked.[17] After dinner, Marcos walked behind KM "and picked her up," and PL "noticed [KM] looked uncomfortable."[18]

Later that evening, PL was folding laundry and asked Marcos to go get some hangers.[19] "He took longer" to go up the stairs and come back down than PL expected.[20] She went upstairs to find out what

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[12] RR4:21, 48, 66.

[13] RR4:22, 48–49, 67.

[14] RR4:23–24.

[15] RR4:23–24.

[16] RR4:24.

[17] RR4:24–25.

[18] RR4:25.

[19] RR4:26.

[20] RR4:26, 37.

was taking so long and saw him coming from KM's room.[21] He said that he "was just getting hangers."[22]

KM testified that Marcos touched her and kissed her at this time.[23] Then she went to her bedroom and went to bed.[24] At some point, she said, Marcos came into the room and woke her up.[25] He touched her under her clothes on her breast, and over her clothes on her vagina.[26] She said he removed her clothes and made her perform oral sex, after which he put his penis in her vagina.[27] Then, she claimed, he told her that if she told anyone they would both get in trouble and she and her mother would be homeless.[28] But she also said he told her that no one would believe her.[29]

Afterwards, KM took a shower and put her clothes in the hamper, while Marcos went back to PL's room.[30] The next morning, KM got up, took another shower, and then got ready for her soccer game.[31]

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[21] RR4:26, 38.

[22] RR4:26.

[23] RR4:69, 91.

[24] RR4:69.

[25] RR4:70.

[26] RR4:70–72.

[27] RR4:72–73.

[28] RR4:73.

[29] RR4:74.

[30] RR4:75–76.

[31] RR4:78.

KM, PL, and Marcos all went to the soccer game.[32] PL thought that Marcos stayed unusually close to them while they were there.[33]

When they got home, PL thought that KM seemed "a little off."[34] KM said that, after PL had gone upstairs, Marcus walked up and touched her again on her vagina, over her clothes.[35] KM then went upstairs and took another shower a few hours later.[36]

Later that day, while KM was in the kitchen eating ice cream, PL asked her if Marcos "had ever been inappropriate with her."[37] According to PL, "her facial expression said it all."[38] They went outside to talk more, after which PL came inside to confront Marcos while KM stayed outside.[39] While PL was kicking Marcos out, KM called the police.[40]

Police and an ambulance arrived while everyone was still at the house.[41] EMS records showed that KM reported having been "sexually assaulted by her stepfather" at "around 0100 this

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[32] RR4:27–28, 77.

[33] RR4:28.

[34] RR4:29, 56.

[35] RR4:77.

[36] RR4:78.

[37] RR4:31, 51–52, 78.

[38] RR4:31.

[39] RR4:33, 53, 78.

[40] RR4:33–34, 78; SX1.

[41] RR4:34, 79.

morning."[42] She specified to EMS that he "stuck his privates into her privates."[43] EMS took both KM and PL to Cypress Memorial Hermann Hospital and then to Memorial Hermann downtown.[44]

Law enforcement investigates.

Harris County Sheriff's Detective Eric Hernandez was assigned to the case after the 911 call.[45] This was one of his first cases as a detective.[46] He went to the hospital where he met with KM and her mother.[47] He got a statement from PL "about what happened."[48] From this, he determined that "the incident took place" at "their residence."[49] Det. Hernandez then met with Marcos, who did not agree to give a statement.[50]

Det. Hernandez sent Deputy Pierre Abarca to the residence with PL to collect "items that might have evidence on them"—mainly, KM's clothes and comforter.[51] Dep. Abarca collected a pair of black

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[42] SX2.

[43] SX2.

[44] RR4:35, 79.

[45] RR3:11–12, 14; SX1.

[46] RR3:24.

[47] RR3:15.

[48] RR3:15.

[49] RR3:15.

[50] RR3:16.

[51] RR3:16, 30–31 35–36, 38–39.

underwear, a red t-shirt, a black bra, red and blue pajama bottoms, a gray t-shirt, two light colored bedsheets, and a comforter.[52] He did not document the comforter in his report, and later suggested that he did not, in fact, collect the comforter.[53] After Dep. Abarca collected the items, he gave them to Det. Hernandez, who took them to the medical examiner's office for testing.[54] Det. Hernandez documented the same items in his report; he did not list a comforter, either.[55]

KM details her accusations to the SANE nurse.

KM received a SANE exam, in which evidence was collected from her body.[56] Elizabeth Williams, a nurse at Memorial Hermann Hospital, did the exam.[57]

During the exam, KM told Williams that her "mother's boyfriend, Marcos Abad" came into her room at about 1:00 a.m. that morning, began touching her breast and vagina, made her perform oral sex, then put his penis in her vagina, then her "butt," then back in her vagina.[58]

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[52] RR3:42–43, 44–45.

[53] RR3:45.

[54] RR3:31, 41.

[55] RR3:30.

[56] RR3:18, 78–79.

[57] RR3:47–48, 57, 68–69; SX11.

[58] RR3:70–71; SX11.

KM didn't remember telling Williams these things, but she admitted that she "probably did say that."[59] At the State's urging, she affirmed that she "probably remembered all the details a little bit better then."[60]

Williams observed "four" injuries on KM: 1) a pinpoint bruise on the labia minora, 2) two pinpoint bruises on the opening to the vagina, 3) a two centimeter acute laceration on the perinium that was actively bleeding, and 4) what she described as "all of this."[61] She testified that these injuries were consistent with the allegations.[62] She acknowledged, however, that they could also be from an object other than a penis.[63]

KM talks to a forensic interviewer.

Det. Hernandez set up a forensic interview for KM a couple of days later at the Children's Assessment Center.[64] During the forensic interview, KM again said that Marcos tried to put his penis in her "butt."[65]

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[59] RR4:92.

[60] RR4:93–94.

[61] RR3:73–75 (answering, "All of this" when asked, "What was the fourth injury that you observed?").

[62] RR3:75, 83.

[63] RR3:81, 83–84.

[64] RR3:17; RR4:46, 80, 90–91.

[65] RR4:101.

DNA testing is inconclusive.

When the evidence collected from the residence was first tested, Det. Hernandez learned that there was another contributor of DNA besides KM, so he got a search warrant for Marcos's DNA.[66] He collected a specimen and turned it over for testing.[67] Marcos was cooperative with this process.[68]

DNA testing excluded Marcos as a contributor of the DNA swabbed from KM's vagina, labia majora, labia minora, mouth, peri-anal area, and neck.[69] There was "limited support for inclusion" of Marcos as a contributor of DNA swabbed from KM's left breast.[70]

With respect to KM's clothes—not all of which matched what Det. Hernandez had logged[71]—there was "limited support for inclusion" of Marcos as a contributor of DNA on the black underwear and the pajamas, "moderate support for inclusion" on the blue underwear, and "very strong support for inclusion" on the black bra and red shirt.[72]

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[66] RR3:18–19, 21; SX4.

[67] RR3:22.

[68] RR3:33.

[69] RR3:102–05; SX12.

[70] RR3:104; SX12.

[71] RR3:118.

[72] RR3:106–13; SX12.

Summary of the Argument

Issue One

The jury charge was erroneous because it did not instruct the jury that they must be unanimous as to a single, discrete incident of the charged offense. Marcos was indicted for penis-to-vagina sexual assault. The State presented evidence that Marcos committed four distinct sexual assaults: 1) mouth-to-penis, then 2) penis-to-vagina, then 3) penis-to-anus, then 4) penis-to-vagina again. The second and fourth alleged sexual assaults each comprised a separate incident of the offense alleged in the indictment. When that happens, the court is obligated to instruct the jury that they must be unanimous as to a single incident.

The court's failure to ensure unanimity was egregiously harmful because it deprived Marcos of the valuable right to a unanimous jury verdict. The charge as a whole, the state of the evidence and the contested issues, and the court's comments during jury selection all weigh in favor of finding egregious harm, and nothing militates against such a finding.

Issue Two

The judgment contains five errors that this Court should correct. First, the judgment assesses a $100 fine that this Court should delete because 1) it is unauthorized by statute and therefore illegal, and 2) it was not pronounced in Marcos's presence.

Second, the judgment does not reflect the statute for the offense, even though the code of criminal procedure requires the court to use the OCA standard judgment form that includes a field for that information.

Third, the judgment assesses $15 in reimbursement fees for "arrest," but the record shows that Marcos was arrested only twice, which is a basis for only $10 in fees.

Fourth, the judgment assesses $15 in reimbursement fees for "release," but the record shows that Marcos was released by a peace officer only twice, which is a basis for only $10 in fees. Marcos's being transferred from jail to prison is not "release" under any possible meaning of that word, and this Court should say so.

Finally, the judgment assesses $700 in reimbursement fees for summoning witnesses by a peace officer, but the record shows that only 36 subpoenas were validly served by a peace officer, which provides a basis for only $180 in fees.

Issue Three

The bill of costs contains three errors that this Court should correct. First, the bill should not contain any fines, costs, or fees *at all*. The issuance of the bill of costs makes the costs payable now. But the court directed in the judgment that Marcos not pay any costs until later—specifically, upon his release from confinement. This Court should fix that conflict by removing all of the not-yet-payable costs from the bill of costs.

Second, the bill should not contain the $100 fine, which 1) was statutorily unauthorized and therefore illegally assessed, 2) was not pronounced in Marcos's presence, and 3) as a punitive fine, should not be in the bill, anyway.

Third, the bill should not contain the improperly assessed reimbursement fees that do not have a basis in the record.

ARGUMENT

Issue One

1. The court's charge erroneously failed to instruct the jury that they must be unanimous as to a single, discrete incident of the charged offense, and this error egregiously harmed Marcos.

Though the State charged Marcos with a single count of penis-to-vagina sexual assault, it presented evidence of two discrete penis-to-vagina sexual assaults at trial.[73] But the court's charge did not instruct the jury that they must be unanimous as to a single, discrete incident.[74] This unobjected-to[75] omission egregiously harmed Marcos.

1.1. Standard of Review.

The trial court must provide the jury with a written charge distinctly setting forth the law applicable to the case. Tex. Code Crim. Proc. art. 36.14. Review of jury-charge error is a two-step process: first, the reviewing court must decide whether error exists; second, it must review any error for harm. *Alcoser v. State*, 663 S.W.3d 160, 165 (Tex. Crim. App. 2022); *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

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[73] RR3:70–71; SX11.

[74] CR:741–49.

[75] RR4:106.

If the defendant didn't object to the error, he is entitled to reversal if he suffered egregious harm, which occurs when the charge error affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Id.* (both citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)).

Neither party bears the burden of showing harm or lack thereof. *Id.* Whether harm exists is based on four factors: 1) the entire jury charge, 2) the state of the evidence, including the contested issues and the weight of the probative evidence; 3) the arguments of counsel, and 4) any other relevant information revealed by the record as a whole. *Id.* (both citing *Almanza*, 686 S.W.2d at 171).

1.2. When the State presents evidence of more than one incident that constitutes the charged offense, the trial court must craft a charge that ensures a unanimous verdict.

A criminal defendant has a right to a unanimous jury verdict under both the United States and Texas Constitutions and under Texas statutory law. *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020); *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005); U.S. Const. art. VI, XIV; Tex. Const. art. V, § 13; Tex. Code Crim. Proc. art. 36.29(a).

The unanimity requirement requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). This means that the jury must "agree upon a single and

discrete incident that would constitute the commission of the offense alleged." *Id.* Every juror must agree that "the defendant committed the same, single, specific criminal act." *Ngo*, 175 S.W.3d at 745.

The Court of Criminal Appeals has held that non-unanimity may occur when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions. *Cosio*, 353 S.W.3d at 772. This is because each incident establishes a different offense or unit of prosecution. *Id.* To ensure unanimity, the jury charge must instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented. *Id.*

In such cases, if the defendant requests, the State must elect which incident it will rely on to convict the defendant. *Id.* at 774. But even if the defendant does not request an election, the trial court is still "obligated to submit a charge that does not allow for the possibility of a non-unanimous verdict." *Id.* at 776. The Court explained:

> To guarantee unanimity in this context … the jury must be instructed that it must unanimously agree on one incident of criminal conduct (or unit of prosecution), based on the evidence, that meets all of the essential elements of the single charged offense beyond a reasonable doubt.

Id.

1.3. Evidence of more than one instance of a complete, ultimate sexual assault is evidence of separate offenses.

The gravamen of an offense best describes the allowable unit of prosecution. *Loving v. State*, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013). The gravamen of penetrative sexual assault is the act of penetration. *Jourdan v. State*, 428 S.W.3d 86, 96 (Tex. Crim. App. 2014). Accordingly, the Court of Criminal Appeals has observed that when a single transaction includes multiple instances of a "complete, ultimate sexual assault," each instance of sexual assault is a separate offense:

> If the victim says Dangerous Dan raped her, then forced oral sex, then raped her again, then forced oral sex again—there are four criminal convictions possible.

Aekins v. State, 447 S.W.3d 270, 282 (Tex. Crim. App. 2014) (citing *Patterson v. State*, 152 S.W.3d 88, 92 (Tex. Crim. App. 2004)).

1.4. Because the State presented evidence of two complete, ultimate penis-to-vagina sexual assaults, it presented evidence of more than one incident that constituted the charged offense.

What the Court described in *Aekins* is exactly what happened here. The State presented evidence—in the form of KM's statements to the SANE nurse, Elizabeth Williams—that Marcos 1) forced KM to

perform oral sex, then 2) vaginally raped her, then 3) anally raped her, then 4) vaginally raped her again.[76]

This is evidence of four "complete, ultimate sexual assault[]" offenses—four acts of penetration, each being the gravamen of penetrative sexual assault. *Jourdan*, 428 S.W.3d at 96. Each act, being the gravamen of the offense, thus comprises a separate and distinct allowable unit of prosecution. *Loving*, 401 S.W.3d at 647.

Most importantly, the second and fourth alleged acts are both penis-to-vagina sexual assault, and therefore both acts constitute the offense alleged in the indictment.[77] Put another way, the State presented evidence that KM alleged "two essentially identical" penis-to-vagina sexual assaults, "separated by a short period of time" during which Marcos also allegedly committed a penis-to-anus sexual assault. *Patterson*, 152 S.W.3d at 92.

Therefore, the two alleged incidents of penis-to-vagina sexual assault established two units of prosecution that met the elements of the charged offense. *Cosio*, 353 S.W.3d at 772. Because the State presented evidence of more than one unit of prosecution that met the elements of the charged offense, the court was obligated to instruct the jury that they must be unanimous as to which one Marcos was guilty of. *Id.*

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[76] RR3:70–71; SX11.

[77] CR:26.

1.5. The court failed to give the required unanimity instruction. Even though the court was obligated to give a proper unanimity instruction, it failed to do so.[78] The court's charge set out the abstract definitions applicable to penis-to-vagina penetrative sexual assault.[79] Then it set out an application paragraph that tracked the allegation in the indictment.[80] It contained instructions regarding the date alleged in the indictment,[81] the defendant's right not to testify,[82] the proper use of extraneous offenses,[83] the burden of proof,[84] and the jury's duties during deliberations.[85]

The charge contained the word "unanimous" only twice. First, it described the Foreperson's duty to certify the verdict "when you have unanimously agreed upon a verdict."[86] Second, it closed with the instruction, "Your verdict must be by a unanimous vote of all members of the jury."[87] Neither instruction complied with the court's obligation to ensure a unanimous verdict. A "boilerplate" instruction

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[78] CR:741–49.

[79] CR:741.

[80] CR:741–42, *compare with* CR:26.

[81] CR:743.

[82] CR:744.

[83] CR:745–46.

[84] CR:747.

[85] CR:748.

[86] CR:748.

[87] CR:749.

that the jury's verdict must be unanimous is not sufficient because the jury can understand it to mean that they must be unanimous about the offense in general, not a particular incident comprising the offense. *Cosio*, 353 S.W.3d at 773.

1.6. The court's failure to ensure a unanimous verdict egregiously harmed Marcos.

Marcos's counsel didn't object to the court's failure to ensure a unanimous jury verdict.[88] To be entitled to reversal, Marcos must show that he suffered egregious harm, which occurs when the error deprives the defendant of a valuable right. *Alcoser*, 663 S.W.3d at 165; *Villarreal*, 453 S.W.3d at 433; *Almanza*, 686 S.W.2d at 171.

The court's error in this case deprived Marcos of his "valuable right to a unanimous jury verdict." *Ngo*, 175 S.W.3d at 750 (affirming court of appeals's finding of reversible error); *see also Ramos*, 590 U.S. at 93; U.S. Const. art. VI, XIV; Tex. Const. art. V, § 13; Tex. Code Crim. Proc. art. 36.29(a). A full *Almanza* analysis confirms this:

The entire jury charge: The jury charge permitted a non-unanimous verdict, and nothing in the charge militates against such a conclusion. *See Cosio*, 353 S.W.3d at 777. In fact, the boilerplate unanimity instruction, by opening the jury up to a misunderstanding

[88] RR4:106.

of what unanimity requires, was "worse than saying nothing." *Ngo*, 175 S.W.3d at 745.

The state of the evidence, including the contested issues and the weight of the probative evidence: Because the DNA evidence was inconclusive, the contested issue at trial was the credibility of the State's witnesses.

Defense counsel pointed out numerous inconsistencies, conflicts, and weaknesses in the testimony. PL testified that KM was upstairs before Marcos went up there,[89] while KM said that Marcos was already there when she went upstairs.[90]

PL testified that her suspicions were raised because Marcos took too long getting hangers,[91] but she had told the police that she was suspicious because she heard "kissing" sounds from upstairs.[92] PL said that KM knocked on her door the next morning;[93] KM said she didn't.[94]

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[89] RR4:26

[90] RR4:69.

[91] RR4:26, 37.

[92] RR4:39.

[93] RR4:27.

[94] RR4:77.

KM testified that Marcos only forced oral sex once and vaginal penetration once,[95] and that he did not put his penis anywhere else.[96] She claimed not to remember telling the police about anal sex.[97]

KM also claimed not to remember telling SANE nurse Williams about the four separate acts, but then admitted that she "probably did say that" and "probably remembered all the details a little bit better then."[98] Meanwhile, Det. Hernandez confirmed that she also told the forensic interviewer about the anal-sex allegation.[99]

These discrepancies meant that each juror was faced with at least ten options:

1) believe KM's trial testimony that there was one incident of penis-to-vagina sexual assault;
2) believe KM's statement to the SANE nurse that there were two incidents of penis-to-vagina sexual assault;
3) believe both KM's testimony and her statement to the nurse, finding that KM's memory wasn't perfect;
4) find KM to be not credible about one penis-to-vagina sexual assault but not the other;
5) find that penis-to-vagina sexual assault happened once without any anal sex;
6) find that penis-to-vagina sexual assault happened twice without any anal sex;

[95] RR4:72–73.

[96] RR4:92.

[97] RR4:92–93.

[98] RR4:92–94.

[99] RR4:101.

7) find that penis-to-vagina sexual assault happened twice with anal sex;
8) find that penis-to-vagina sexual assault happened once before anal sex;
9) find that penis-to-vagina sexual assault happened once after anal sex; or
10) find KM not credible about either penis-to-vagina sexual assault and that neither happened.

Only the final option, if unanimously found by every juror, would result in an acquittal. Under the jury charge as given, any other option would result in a conviction. But worse than that, any *combination* of the other nine options among the jurors would lead to a conviction, regardless of which alleged act of penetration each juror individually believed.

The arguments of counsel: Neither side directly mentioned multiple sexual assaults or the unanimity issue during closing arguments. The first prosecutor consistently used singular words—"the," "this," "it"—to describe what happened.[100] Defense counsel focused his closing argument on attacking KM's credibility and arguing that she had a strong motive to lie.[101] He challenged the quality of the investigation.[102] He pointed out discrepancies between KM's trial testimony and the SANE nurse's findings, but he never

[100] RR5:7, 8,

[101] RR5:13–14

[102] RR5:16–17.

addressed the evidence that KM described two discrete penis-to-vagina sexual assaults.[103]

The second prosecutor toed the line, pointing out that KM described "everything he does to her," but then simply described KM's injuries: a scratch on her butt, a cut near her anus, bruising in her vagina.[104] She directed the jury's attention to KM's statement to the SANE nurse, which was the evidence of two separate offenses, when she told the jury: "She gives details then. The nurse documents the injuries …."[105] She then argued that KM was credible and that there were "no inconsistencies in her testimony."[106]

Any other relevant information revealed by the record as a whole: The court addressed unanimity during jury selection, telling the panel that "Unanimous … means all 12 have to agree either the person is guilty or not guilty."[107] The court further explained unanimity by distinguishing it from a grand jury's decision to indict, which "does not need to be unanimous. All you need is 9 out of 12 votes for … an indictment …."[108]

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[103] RR5:18–19.

[104] RR5:22.

[105] RR5:22.

[106] RR5:23.

[107] RR2:28.

[108] RR2:31.

This "explanation" was no better than the boilerplate unanimity instruction in the jury charge. *Cosio*, 353 S.W.3d at 773; *Ngo*, 175 S.W.3d at 745. In fact, it was worse. By telling the jury that they had to be unanimous only as to whether Marcos was "guilty or not guilty," the court expressly told the jury that they must be unanimous about the offense in general, as opposed a particular incident comprising the offense. There was no risk of misunderstanding here; the court's meaning was crystal clear.

In sum, the entire charge, the state of the evidence and the contested issues, and the court's comments during jury selection all weigh in favor of finding egregious harm. The arguments of counsel, meanwhile, did nothing to militate against the harm from the erroneous instruction. On this record, this Court should conclude that the charge was egregiously harmful, reverse Marcos's conviction, and remand for a new trial. *Ngo*, 175 S.W.3d at 752; Tex. R. App. P. 43.2(d).

Issues Two & Three
(Judgment & Bill of Costs)

There are errors in the judgment and the bill of costs. This Court should fix them.

Authority to Correct Judgment and Bill of Costs

This Court has the authority to modify a trial court's judgment to make the record speak the truth when it has the necessary information to do so. Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992). A defendant may challenge the costs imposed in a bill of costs for the first time on appeal when the costs are not imposed in open court and the judgment does not contain an itemization of the costs. *London v. State*, 490 S.W.3d 503, 507 (Tex. Crim. App. 2016).

This Court may modify a bill of costs on appeal because the bill of costs obligates an appellant to pay the items listed. *Jones v. State*, 691 S.W.3d 671, 679 (Tex. App.—Houston [14th Dist.] 2024, pet. ref'd). A court of appeals may modify the bill of costs independent of the trial court's judgment. *Pruitt v. State*, 646 S.W.3d 879, 883 (Tex. App.—Amarillo 2022, no pet.); *Bryant v. State*, 642 S.W.3d 847, 850 (Tex. App.—Waco 2021, no pet.); *Dority v. State*, 631 S.W.3d 779, 794 (Tex. App.—Eastland 2021, no pet.); *Contreras v. State*, Nos. 05-20-00185-CR, 05-20-00186-CR, 2021 WL 6071640, at *8 (Tex.

App.—Dallas Dec. 23, 2021, no pet.) (mem. op., not designated for publication); *see also* Tex. R. App. P. 43.6 (a court of appeals "may make any … appropriate order that the law and the nature of the case require").

2. This Court should modify the judgment to correct multiple errors.

This Court should correct five errors in the judgment.

2.1. This Court should modify the judgment to delete the $100 child abuse fine.

The first error is that the judgment lists $100 in fines and states that the fine is a statutory "Child Abuse Prevention Fine."[109] *See* Tex. Code Crim. Proc. art. 102.0186. The judgment should not have imposed this $100 fine in the judgment for two reasons: 1) it is an illegal sentence, and 2) the court did not pronounce it in Marcos's presence.

2.1.1. The $100 fine is an illegal sentence.

The $100 fine is an illegal sentence because it is a fine, not a cost, that is unauthorized by law.

A fine is punitive and part of the defendant's sentence. *Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016, pet. dism'd) (citing *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex.

[109] CR:753–54.

Crim. App. 2011)). A trial court renders an illegal sentence when it imposes an unlawful fine. *Triana v. State*, No. 14-23-00167-CR, 2024 WL 4595107, at *5 (Tex. App.—Houston [14th Dist.] Oct. 29, 2024, no pet.) (mem. op., not designated for publication) (citing *Ex parte Parrott*, 396 S.W.3d 531, 534 (Tex. Crim. App. 2013)). An illegal sentence can be attacked for the first time on direct appeal. *Id.* (citing *Ex parte Seidel*, 39 S.W.3d 221, 225 n.4 (Tex. Crim. App. 2001); *Proenza v. State*, 541 S.W.3d 786, 792 (Tex. Crim. App. 2017)).

Relevant here, the current statute that mandates the Child Abuse Prevention Fine provides that a person convicted of certain sexual assault offenses "shall pay a fine of $100 on conviction of the offense." Tex. Code Crim. Proc. art. 102.0186(a). This statute was part of the 2019 Cost Act that overhauled the assessment of costs, fees, and fines in Texas, and it applies only to offenses committed on or after its effective date of January 1, 2020. *See* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, §§ 5.01, 5.04, 2019 Tex. Gen Laws 3981, 4035. The statutory imposition of this fine therefore does not apply to offenses committed before that date. *Triana*, 2024 WL 4595107, at *5.

Because the offense in this case was alleged to have been committed April 28, 2019, the current version of article 102.0186 does not apply and Marcos could not be assessed a $100 Child Abuse

Prevention Fine. *Id.* Accordingly, the trial court imposed an unauthorized fine.

The version of the statute that was in effect in 2019 classified this charge as a "cost" rather than a "fine." *Triana*, 2024 WL 4595107, at *5. The Court of Criminal Appeals has held that the date of *conviction* controls the application of statutory court costs. *Bradshaw v. State*, 707 S.W.3d 412, 417–20 (Tex. Crim. App. 2024). Thus, when a defendant is convicted after January 1, 2020, of a pre-2020 offense, the $100 cost does not apply, either. *Triana*, 2024 WL 4595107, at *5.

Marcos was convicted on October 24, 2024, so the current version of the statute controls as to costs. *Id.* Under the current version of the Cost Act, there is no $100 *cost* than can be assessed upon conviction. Tex. Code Crim. Proc. art. 102.0186.

Simply put: Because Marcos was convicted after January 1, 2020, of a pre-2020 offense, neither the $100 fine nor the $100 cost could be lawfully imposed. This Court should therefore find that the $100 fine is illegal, reverse the part of the judgment that imposed it, and render a judgment without the illegal fine. *Id.*; Tex. R. App. P. 43.2(c).

2.1.2. The trial court did not impose the $100 fine in Marcos's presence.

Even if the fine were authorized by law, this Court should still delete it because the court did not impose it in Marcos's presence.

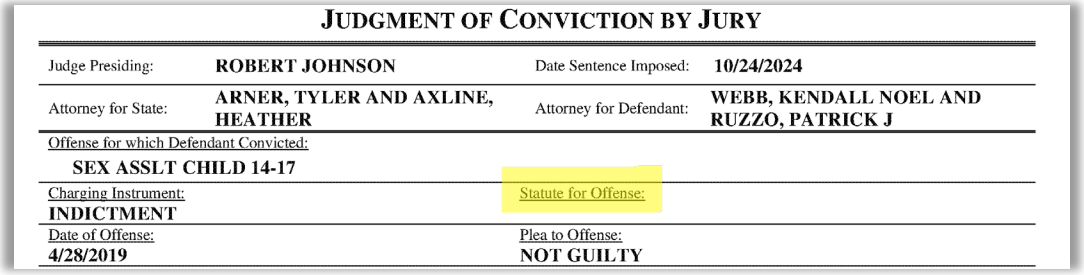
Fines are part of the sentence. *Williams*, 495 S.W.3d at 590. The code of criminal procedure requires the sentence to be pronounced in the defendant's presence. Tex. Code Crim. Proc. art. 42.03, § 1(a). When there is a conflict between the oral pronouncement of sentence and the written judgment, the oral pronouncement controls. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004).

Here, while the judgment imposes a $100 fine, the trial court did not orally pronounce the $100 fine at sentencing.[110] The court's oral pronouncement controls, and this Court should modify the judgment to delete the unpronounced fine. *Armstrong*, 340 S.W.3d at 767; *Taylor*, 131 S.W.3d at 500). Tex. R. App. P. 43.2(b).

[110] RR5:57.

2.2. This Court should modify the judgment to reflect the statute for the offense.

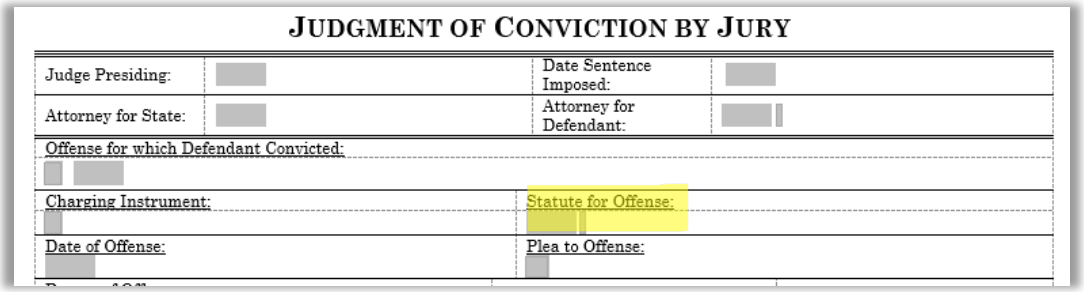
The second error is that the judgment doesn't list the statute for the offense. It contains a space labelled "Statute for Offense:," but that space is blank:[111]



JUDGMENT OF CONVICTION BY JURY

Judge Presiding:	ROBERT JOHNSON	Date Sentence Imposed:	10/24/2024
Attorney for State:	ARNER, TYLER AND AXLINE, HEATHER	Attorney for Defendant:	WEBB, KENDALL NOEL AND RUZZO, PATRICK J
Offense for which Defendant Convicted: SEX ASSLT CHILD 14-17			
Charging Instrument: INDICTMENT		Statute for Offense:	
Date of Offense: 4/28/2019		Plea to Offense: NOT GUILTY	

The Code of Criminal Procedure requires judgments to state the statute for the offense because: 1) it expressly requires the Office of Court Administration to promulgate a standardized felony judgment form, 2) it expressly requires courts to use that form, and 3) the form promulgated by OCA contains a field for the "Statute for Offense."[112] Tex. Code Crim. Proc. art. 42.01, § 4.



JUDGMENT OF CONVICTION BY JURY

Judge Presiding:		Date Sentence Imposed:	
Attorney for State:		Attorney for Defendant:	
Offense for which Defendant Convicted:			
Charging Instrument:		Statute for Offense:	
Date of Offense:		Plea to Offense:	

[111] CR:753.

[112] Office of Court Administration, *Rules & Forms—Standardized Felony Judgment Forms*, "Judgment of Conviction by Jury" & "Instructions for Felony Judgment Forms," online at https://www.txcourts.gov/forms/ (last visited July 9, 2025).

Accordingly, a court must include the statute for the offense on the judgment. Because the court did not do so, this Court should modify the judgment to add "Tex. Penal Code § 22.011" under the statute heading. Tex. R. App. P. 43.2(b).

2.3. This Court should delete $5 from the arrest fees.

The third error is that the judgment's $865 reimbursement-fee assessment includes, according to the bill of costs, $15 for "Arrest w/out Capias."[113] This is error because the record supports an assessment of only $10 in warrantless-arrest fees.

A court is authorized to assess a $5 reimbursement fee for "making an arrest without a warrant" "to defray the costs of services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(1). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[114]

The record in this case shows that Marcos was arrested on April 29, 2019, and his bond was set at $150,000.[115] His bond was lowered twice before he posted $70,000 bail and was released on March 8, 2020.[116] After the State filed a bond violation report in

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[113] CR:753, 756.

[114] The Old Code of Criminal Procedure, being less apt to mince words than the 1965 revision, called such a practice what it is: "Extortion." *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

[115] CR:787.

[116] CR:787–88.

September, Marcos was "remanded to custody" on September 16, 2020, and the court set a new bond amount of $140,000.[117] Marcos posted that and was released four days later.[118] The record shows no other warrantless arrests—instead, the next time Marcos was arrested, it was pursuant to both a capias and a bench warrant.[119]

Because the record shows only two warrantless arrests in this case, the record supports the assessment of only $10 in arrest fees. This Court should delete the $5 over-assessment. Tex. R. App. P. 43.2(b).

2.4. This Court should delete $5 from the release fees.

The fourth error is that the assessed reimbursement fees also include $15 for "Release Fee."[120] This is error because the record supports an assessment of only $10 in release fees.

A court is authorized to assess a $5 reimbursement fee for "commitment or release" "to defray the costs of services provided in the case by a peace officer." Tex. Code Crim. Proc. art.

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[117] CR:789.

[118] CR:789.

[119] CR:646, 648, 691, 692, 792. These dual same-day arrests are accounted for in the bill of costs, which shows that the court assessed $100 for "LEA – Capias Execution." CR:756. *See* Tex. Code Crim. Proc. art. 102.011(a)(2) (authorizing court to assess $50 reimbursement fee for peace officer's executing an issued arrest warrant or capias).

[120] CR:876, 879.

102.011(a)(6). But, again, a cost may not be imposed for a service not performed. *Id.* art. 103.002.[121]

The record shows that Marcos was released on bond twice in this case.[122] Thus, the record supports an assessment of only $10 for release by a peace officer.

True, Marcos was sentenced to confinement in prison, and other courts have said that the release fee may also be assessed when the defendant is sent to prison. *Briceno v. State*, 675 S.W.3d 87, 97 (Tex. App.—Fort Worth 2023, no pet.); *Willingham v. State*, No. 13-22-00162-CR, 2023 WL 4942017, at *12 (Tex. App.—Corpus Christi–Edinburg Aug. 3, 2023, pet. ref'd) (mem. op., not designated for publication); *Williams*, 495 S.W.3d at 591–92. That is because, they say, the defendant is "released" from the custody of the local Sheriff "into the possession of the prison system." *Id.*

There are two problems with these cases. First, they're untethered from the English language. "Release" is a transitive verb that means "to set free from restraint, confinement, or servitude." *Release*, Merriam-Webster's Collegiate Dictionary (11th ed. 2020). Moving someone from jail to prison is a lot of things—taking, transferring,

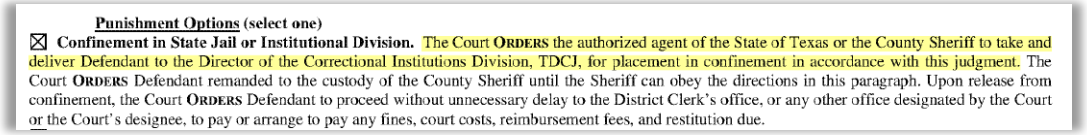
[121] It would be "Extortion" to do so. *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

[122] CR:788 ($70,000 bond posted March 9, 2020), 789 ($140,000 bond posted September 21, 2020).

delivering—but it's not releasing. A prisoner who is transferred directly from a jail to "the possession of the prison system" is no more "released" than is a fish that is transferred directly from a livewell to a cutting board.[123]

Second, they're distinguishable from the record in this case. In *Williams*, the First Court of Appeals stated that the trial court's judgments "ordered the Harris County Sheriff 'to take, safely escort, and deliver Defendant to the Director, Institutional Division, TDCJ." *Williams*, 495 S.W.3d at 592. A sheriff is a peace officer. Tex. Code Crim. Proc. art. 2A.001(1). Thus, even if transferring a person to prison is "releasing" them, the record in *Williams* showed that the service was performed by a peace officer, as required for the release fee to be assessed. Tex. Code Crim. Proc. art. 102.011(a)(6).

Here, by contrast, the judgment orders an "authorized agent" of *either* "the State of Texas" *or* "the County Sheriff" to transfer Marcos to prison:[124]



Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of the State of Texas or the County Sheriff to take and deliver Defendant to the Director of the Correctional Institutions Division, TDCJ, for placement in confinement in accordance with this judgment. The Court **ORDERS** Defendant remanded to the custody of the County Sheriff until the Sheriff can obey the directions in this paragraph. Upon release from confinement, the Court **ORDERS** Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or arrange to pay any fines, court costs, reimbursement fees, and restitution due.

[123] Similarly, one wonders whether the 1993 film "Free Willy" would still have been a box-office smash if Willy had been "released" from Northwest Adventure Park to the Portland Aquarium rather than to the Pacific Ocean.

[124] CR:754.

The record doesn't say who this "authorized agent" is or whether they are a peace officer.

Assuming that Marcos was held in the Harris County Jail before being sent to prison, the law is clear that county jailers are not peace officers. Tex. Code Crim. Proc. art. 2A.066. Thus, unlike in *Briceno*, *Willingham*, and *Williams*, the record here does not show that Marcos was released "by a peace officer," as required by Tex. Code Crim. Proc. art. 102.011(a)(6). *See Wilbanks v. State*, No. 05-24-00537-CR, 2025 WL 1657265, at *4 (Tex. App.—Dallas June 11, 2025, no pet. h.) (mem. op., not designated for publication) (recognizing that art. 102.011 only allows reimbursement fees to be assessed for services performed by peace officers, and striking "notice to appear" fee when the record showed the notice to appear was issued by a clerk and not a peace officer).

Because the record shows that Marcos was released by a peace officer only twice, it supports the assessment of only $10 in release fees. This Court should delete the $5 over-assessment from the judgment. Tex. R. App. P. 43.2(b).

2.5. This Court should delete $520 from the witness-summoning fees because only 36 subpoenas, rather than 140, were validly served by a peace officer.

The fifth error is in the $700 in reimbursement fees assessed as "LEA - Summon Witness." This is error because the record supports an assessment of only $180 in witness-summoning fees.

2.5.1. A court may impose a witness-summoning fee only for a subpoena that was validly served by a peace officer.

A court is authorized to assess a $5 reimbursement fee "for summoning a witness" "to defray the cost of the services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(3). But—yet again—a cost may not be imposed for a service not performed. *Id.* art. 103.002.[125]

In fact, the Court of Criminal Appeals has held that the witness-summoning fee is constitutional only because it serves a legitimate purpose of reimbursing "the expenses … *actually incurred by peace officers* in serving process on witnesses needed for the defendant's proceedings." *Allen v. State*, 614 S.W.3d 736, 745 (Tex. Crim. App. 2019) (emphasis added).

When nothing in the record demonstrates that a peace officer served a subpoena on a witness or conveyed or attached a witness, there is no basis for assessing fees related to summoning, attaching,

[125] The "Extortion" continues. *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

or conveying witnesses. *Rhodes v. State*, 676 S.W.3d 228, 233 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (striking fees for "attach/convey witness" where there was no evidence that a peace officer served a subpoena on any witness or conveyed or attached any witness); *Robles v. State*, No. 01-16-00199-CR, 2018 WL 1056482, at *6 (Tex. App.—Houston [1st Dist.] Feb. 27, 2018, pet. ref'd) (mem. op., not designated for publication) (striking $10 of $25 witness fee when record showed that two of five subpoenas were never served); *see also Wilson v. State*, Nos. 05-22-00452-CR, 05-22-00453-CR, 2023 WL 4758470, at *2 (Tex. App.—Dallas July 26, 2023, pet. ref'd) (mem. op., not designated for publication) (striking witness-service fees for two witnesses when the record showed that neither witness was summoned); *cf. Wilbanks*, 2025 WL 1657265, at *4 (striking "notice to appear" fee when the record showed the notice to appear was issued by a clerk rather than a peace officer).

Thus, for a court to assess a $5 witness-summoning fee, the record must show:

1) valid service of a subpoena
2) by a peace officer.

Both components are subject to statutory limitations, as follows.

2.5.1.1. Service of a subpoena must be in accordance with the statute to be valid.

A criminal subpoena "may summon one or more persons to appear" in court to testify or to bring specified evidence "on a specified day." Tex. Code Crim. Proc. art. 24.01(a), 24.02.

A criminal subpoena is served in one of four ways:

1) reading the subpoena in the hearing of the witness;
2) delivering a copy of the subpoena to the witness;
3) electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address of the witness; or
4) mailing a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness unless [two exceptions apply].

Tex. Code Crim. Proc. art. 24.04(a).

The return of the subpoena must show either: 1) the time and manner of service, if read or delivered to the witness; 2) the acknowledgment of receipt, if emailed; 3) the return receipt, if sent by certified mail; or 4) the cause of failure to serve, if the subpoena is not served. *Id.* art. 24.04(b).

Service not made in accordance with the statute is invalid. *Ex parte Terrell*, 95 S.W. 536, 537–38 (Tex. Crim. App. 1906) (applying 1895 Vernon's Code of Criminal Procedure art. 515, which is the direct predecessor of the modern art. 24.04); *see also Fuller v. State*, No. 14-94-00064-CR, 1996 WL 11176, at *1–2 (Tex. App.—Houston

[14th Dist.] Jan. 11, 1996, no pet.) (not designated for publication) (witness was not validly served, to authorize a writ of attachment, when the record did not show compliance with the statutory methods of service).

2.5.1.2. People other than peace officers are authorized to serve subpoenas.

And even if a subpoena is validly served, it cannot be assumed that a *peace officer* served the subpoena. The subpoena may must "name[]" a person "to summon the person whose appearance is sought." *Id.* art. 24.01(b). That person must be *either:*

1) a peace officer; or
2) at least 18 years old and, at the time the subpoena is issued, not a participant in the proceeding for which the appearance is sought.[126]

Id. Accordingly, a subpoena may be served by someone who is not a peace officer, so long as they otherwise qualify under the statute. *See* Tex. Att'y Gen. Op. No. KP-0207 (2018).

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[126] Until 1981, only peace officers could serve criminal subpoenas. Back then, a criminal subpoena was "a writ issued to the sheriff or other proper officer commanding him to summon one or more persons … to testify," and therefore it could be served only by peace officers. *See* Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, art. 24.01, 1965 Tex. Gen. Laws 317, 416 (amended 1981); *see also* 1925 Vernon's Code of Criminal Procedure art. 461. The legislature changed this in 1981 to allow service of subpoenas by any qualified individual. *See* Act of May 15, 1981, 67th Leg., R.S., ch. 209, § 1, art. 24.01, 1981 Tex. Gen. Laws 503, 503 (codified at Tex. Code Crim. Proc. art. 24.01).

2.5.2. The record shows that only 36 subpoenas were validly served by a peace officer.

Here, the bill of costs shows that the court assessed $700 for summoning witnesses, which, at $5 per subpoena, equates to 140 subpoenas.[127] The record, however, shows that only 36 subpoenas were validly served by a peace officer.

The record contains 141 subpoenas,[128] and it contains applications for all 141.[129] Of those 141 subpoenas, however, 4 have no return showing whether or not they were served.[130] There are also 28 returns that are duplicates of other returns[131] and 8 more returns that merely provide follow-up information for another return.[132]

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[127] CR:753.

[128] CR:35, 37, 39, 81, 101, 106, 149–56, 222–29, 254–61, 272, 277–79, 286–87, 293–95, 323, 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 360, 364, 368, 372, 376, 384, 388, 397–407, 425, 430, 439, 446–59, 476, 485, 487, 489, 491, 493, 495, 497, 499, 501, 503, 505, 507, 509, 511, 539–65, 573, 575, 577, 579, 581, 583, 585, 587, 589, 591, 593, 595, 597, 599, 623, 630, 665–71, 673–75, 688, 695, 700, 704–05, 709, 781.

[129] CR:27, 79, 100, 105, 147, 220, 252–53, 270, 276, 285, 292, 318, 318–21, 359, 363, 367, 371, 375, 383, 387, 395–96, 424, 429, 438, 443–44, 475, 482–84, 538, 551, 562, 570–72, 622, 629, 663–64, 687, 693, 699, 703, 708, 780.

[130] CR:376, 439, 695, 781.

[131] CR:238–41, 386, 390, 419–22, 522–25, 531–33, 545–50, 555, 618–21.

[132] CR:104, 164–66, 288, 391, 393, 423.

That leaves 137 subpoenas[133] with 137 unique returns.[134] Of these 137 subpoenas, the returns show that only 36 were validly served by a peace officer. To see why, its simplest to identify the returns that were *not* validly served by a peace officer. These break down into three categories:

1) subpoenas that were not executed *at all*;
2) subpoenas that were not executed by a peace officer; and
3) subpoenas that were executed by a peace officer but were not validly served.

Let's take each in turn.

2.5.2.1. The 7 "Un-Executed" subpoena returns do not support a witness-summoning fee.

Seven subpoenas[135] were returned "Un-Executed."[136] Each return is explicit that there was no service.[137] These returns are like the one

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[133] CR:35, 37, 39, 81, 101, 106, 149–56, 222–29, 254–61, 272, 277–79, 286–87, 293–95, 323, 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 360, 364, 368, 372, 384, 388, 397–407, 425, 430, 446–59, 476, 485, 487, 489, 491, 493, 495, 497, 499, 501, 503, 505, 507, 509, 511, 539–65, 573, 575, 577, 579, 581, 583, 585, 587, 589, 591, 593, 595, 597, 599, 623, 630, 665–71, 673–75, 688, 700, 704–05, 709.

[134] CR: 41–43, 82, 103, 107, 157–63, 167, 230–37, 242, 262–69, 274, 280–82, 288, 290, 296–98, 347–58, 362, 365, 369, 373, 378, 385, 389, 408–18, 426, 431, 460–61, 463–74, 477, 513–21, 526–30, 542–44, 554, 566, 568–69, 601–02, 604, 606, 608–17, 624, 632, 677, 679–86, 690, 702, 706, 707, 710.

[135] CR:81, 155, 229, 256, 331, 593, 709.

[136] CR:82, 167, 242, 269, 347, 601, 710.

[137] *Id.*

quoted in *Wilson*—where one return said that the subpoena was "cancelled," and the other one said the witness was not served because of a "bad" address. *Wilson*, 2023 WL 4758470, at *2. They show that no witness on any of these subpoenas was served or summoned.

"It follows," as the court said in *Wilson*, "that if the witnesses were not summoned, the service being charged for was not performed." *Id.* Thus, no expenses were actually incurred, and the seven "Un-Executed" subpoenas cannot be the basis of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson,* 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

2.5.2.2. The 10 "Executed" subpoenas that were served by a District Attorney do not support a witness-summoning fee.

Ten subpoenas[138] have returns showing that they were served by a "District Attorney" rather than a peace officer.[139]

A District Attorney is not a peace officer. *See* Tex. Code Crim. Proc. art. 2A.001 ("Peace Officers Generally"). A District Attorney's *investigator* is a peace officer. Tex. Code Crim. Proc. art. 2A.001(5).

[138] CR:293–95, 364, 368, 372, 430, 623, 704–05.

[139] CR:296–98, 365, 369, 373, 431, 624, 706–07.

But none of the ten returns states that the subpoena was served by an investigator.[140]

Because these ten subpoenas were not served by a peace officer, they cannot form the basis of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson,* 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6; Tex. Code Crim. Proc. art. 24.01(b); *cf. Wilbanks*, 2025 WL 1657265, at *4.

2.5.2.3. 84 of the subpoenas that were executed by a peace officer were not validly served and do not support a witness-summoning fee.

The remaining 120 subpoenas[141] have returns that say they were served by a peace officer.[142] But 84 of those returns do not show valid service under any of the four statutory methods. *See* Tex. Code Crim. Proc. art. 24.04(a).

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[140] *Id.* Indeed, none of the "District Attorney" returns contain the signature or printed name of the person who executed it.

[141] CR:35, 37, 39, 101, 106, 149–54, 156, 222–28, 254–55, 257–61, 272, 277–79, 286–87, 323, 325, 327, 329, 333, 335, 337, 339, 341, 343, 345, 360, 384, 388, 397–407, 425, 446–59, 476, 485, 487, 489, 491, 493, 495, 497, 499, 501, 503, 505, 507, 509, 511, 539–41, 552, 563, 564–65, 573, 575, 577, 579, 581, 583, 585, 587, 589, 591, 595, 597, 599, 630, 665–71, 673–75, 688, 700.

[142] CR:41–43, 103, 107, 157–63, 230–34, 236–37, 262–68, 274, 280–82, 288, 290, 348–58, 362, 378, 385, 389, 408–18, 426, 460–61, 463–74, 477, 513–21, 526–30, 542–44, 554, 566, 568–69, 602, 604, 606, 608–17, 632, 677, 679–86, 690, 702.

Of these 120 "peace officer" returns, 119 state that the subpoena was served via "email."[143] Email *can* be a valid method of service, if the subpoena is electronically transmitted, "acknowledgment of receipt requested, to the last known electronic address of the witness." Tex. Code Crim. Proc. art. 24.04(a)(3). An emailed subpoena "must be accompanied by notice that an acknowledgment of receipt of the subpoena must be made in a manner enabling verification of the person acknowledging receipt." *Id.* art. 24.04(c). And the return must show such "acknowledgment of receipt." *Id.* art. 24.04(b).

According to the returns, six of the "email" subpoenas weren't emailed *at all*; instead, they were faxed.[144] Another "email" return is accompanied by a follow-up return that says that it, too, was faxed.[145] Fax is not a valid method of service for a criminal subpoena. Tex. Code Crim. Proc. art. 24.04(a). None of these seven faxed subpoenas support a witness-summoning fee.

Another 43 of the returns show that the subpoenas were delivered to or received by someone other than the witness:

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[143] CR:41–43, 107, 157–63, 230–34, 236–37, 262–68, 274, 280–82, 288, 290, 348–58, 362, 378, 385, 389, 408–18, 426, 460–61, 463–74, 477, 513–21, 526–30, 542–44, 554, 566, 568–69, 602, 604, 606, 608–17, 632, 677, 679–86, 690, 702.

[144] CR:41–43, 348–50.

[145] CR:389 (email return), 393 (follow-up return showing subpoena was actually faxed).

- 17 delivered to Claudia Marines,[146]
- 6 delivered to Dawn Sears,[147]
- 5 received "for" multiple witnesses,[148]
- 4 delivered to "(IFS) Subpoenas,"[149]
- 3 delivered to "CIB Subpoenas,"[150]
- 3 received by Sharon O'Neal,[151]
- 2 received by Sylvia Perez,[152]
- 1 delivered to Michelle Ayala,[153]
- 1 delivered to Louis Medina,[154] and
- 1 received by an auto-reply service at Memorial Hermann Hospital.[155]

That is not sufficient electronic service under the statute, which requires electronic service on "the witness" and acknowledgment of receipt. Tex. Code Crim. Proc. art. 24.04(a)(3), (b). Therefore, none of these 43 subpoenas support a witness-summoning fee.

Of the remaining 70 returns that say a subpoena was emailed, 21 do not show *any* electronic address for the witness on either the

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[146] CR:280–82, 352–54, 410–12, 518–21, 610–12, 632.

[147] CR:515–17, 684–86.

[148] CR:469–73

[149] CR:608–09, 682–83.

[150] CR:231–33.

[151] CR:602, 604, 606.

[152] CR:426, 461.

[153] CR:554.

[154] CR:690.

[155] CR:234.

application,[156] the subpoena,[157] or the return.[158] For three more, a *fax* number, rather than an email address, was given for the witness in the application.[159] And another ten show that the only email address provided in either the application,[160] the subpoena,[161] or the return[162] is for someone *other* than the witness. Accordingly, these 34 returns do not show valid electronic service under the statute, either. Tex. Code Crim. Proc. art. 24.04(a)(3).

2.5.2.4. Only 36 subpoenas support a witness-summoning fee. Thus, of the 137 subpoenas with returns in the record, 7 were "Un-Executed," 10 were served by a "District Attorney," and 84 were executed by a peace officer but not validly served. That leaves 36 returns that appear to show valid service by a peace officer.[163]

At $5 per subpoena, these 36 returns support a total witness-summoning fee of $180—$520 less than the court assessed in the judgment. Tex. Code Crim. Proc. art. 102.011(a)(3). This Court

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[156] CR:105, 147, 220, 252–53, 285, 444.

[157] CR:106, 149–54, 156, 222, 225, 227, 254–55, 257–61, 286, 456, 459.

[158] CR:107, 157–63, 230, 236–37, 262–68, 290, 467–68.

[159] CR:484, 572, 663.

[160] CR:395–96, 443–44, 482, 484, 570, 663.

[161] CR:400, 406, 446, 448, 458, 487, 491, 497, 597, 670.

[162] CR:408–09, 464–65, 474, 513–14, 528, 613, 677.

[163] CR:103, 274, 288, 351, 355–58, 362, 385, 413–18, 460, 463, 466, 477, 526–27, 529, 542–44, 566, 568–69, 615–17, 679, 680–81, 702.

should modify the judgment to remove this $520 over-assessment.[164] Tex. R. App. P. 43.2(b).

3. This Court should modify the bill of costs to remove improperly included items.

There are three errors in the bill of costs. First, the bill improperly includes costs in the first place. Second, the bill improperly includes two fines. Finally, the bill includes improperly assessed reimbursement fees.

3.1. This court should delete all the costs from the bill.

The first error in the bill of costs is that it includes any costs at all. The judgment orders the assessed costs to be paid later,[165] but the issuance of the itemized bill of costs[166] makes the costs payable now. To resolve this conflict between the judgment and the bill of costs, this Court should modify the bill of costs to remove all of the not-yet-payable costs.

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[164] In a recent published opinion, this Court remanded the case to the trial court for "recalculation of the reimbursement fee" when the record—which contained 60 emailed subpoenas—did not support the assessment of $2,835 for an "attach/convey witness" fee. *Ikemere v. State*, No. 14-23-00285-CR, __ S.W.3d __, 2025 WL 1033959, at *4–6 (Tex. App.—Houston [14th Dist.] Apr. 8, 2025, no pet. h.). Unlike that case, remand is not necessary here because the record also contains the subpoenas and returns, which allow this Court to determine which subpoenas support the specific assessment of the witness-summoning fee and to conclude that there are no other "likely costs that should have been assessed" but weren't. *Id.* at *5.

[165] CR:754

[166] CR:756.

3.1.1. A trial court must assess costs in the judgment, but it may also order in the judgment that the costs are payable later—including upon release from confinement.

In a criminal case where the punishment is anything other than a fine, the trial court must "adjudge the costs against the defendant[] and order the collection thereof as in other cases." Tex. Code Crim. Proc. art. 42.16. When imposing a fine and costs, the court may direct a defendant:

1) to pay the entire fine and costs when sentence is pronounced;
2) to pay the entire fine and costs at some later date; or
3) to pay a specified portion of the fine and costs at designated intervals.

Id. art. 42.15(b).

A trial court directs a defendant to pay fines and costs at a later date, in accordance with art. 42.15(b)(2), when it enters an order that the defendant pay fines and costs "upon release from confinement." *See Jones v. State*, No. 13-24-00081-CR, 2024 WL 3934536, at *10 (Tex. App.—Corpus Christi–Edinburg Aug. 26, 2024, pet. filed) (mem. op., not designated for publication); *Carradine v. State*, No. 03-24-00012-CR, 2024 WL 3731846, at *9–10 (Tex. App.—Austin Aug. 9, 2024, no pet. h.) (mem. op., not designated for publication); *Garcia v. State*, No. 07-23-00318-CR, 2024 WL 3643786, at *1 (Tex. App.—Amarillo Aug. 2, 2024, no pet. h.) (mem. op., not designated for publication); *Polanco v. State*, 690

S.W.3d 421, 433–35 (Tex. App.—Eastland 2024, no pet.); *Sloan v. State*, 676 S.W.3d 240, 242 (Tex. App.—Tyler 2023, no pet.).

3.1.2. The issuance of a bill of costs by a district clerk makes court costs payable immediately.

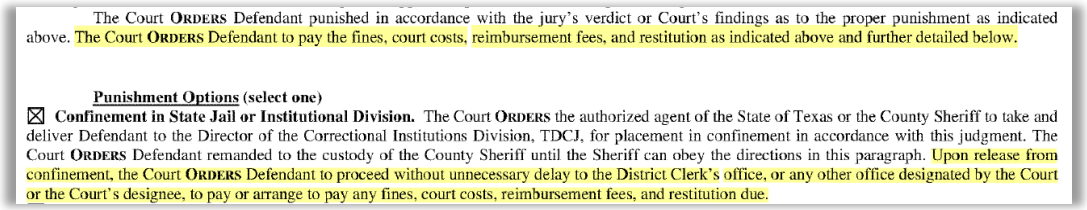
Assessed costs become payable upon the issuance of a signed bill of costs. That is because a cost is not payable by the person charged with the cost until a written bill containing the item of cost is produced, signed by the officer who charged the cost or the officer who is entitled to receive payment of the cost, and provided to the person charged with the cost. Tex. Code Crim. Proc. art. 103.001(b). A district clerk is authorized to collect court costs. Tex. Code Crim. Proc. art. 103.003(a). Thus, upon issuance, the bill of costs "obligates" an appellant "to pay the items listed." *Jones*, 691 S.W.3d at 679.

3.1.3. The trial court's judgment orders Marcos to pay the fine and costs at a later date, but the bill of costs conflicts with this order by making the fine and costs payable now.

In this case, the judgment assesses fines, costs, and fees as required by statute.[167] Tex. Code Crim. Proc. art. 42.16. Specifically, it orders

[167] CR:753.

Marcos to pay the fines, costs, and fees "upon release from confinement":[168]



The Court ORDERS Defendant punished in accordance with the jury's verdict or Court's findings as to the proper punishment as indicated above. The Court ORDERS Defendant to pay the fines, court costs, reimbursement fees, and restitution as indicated above and further detailed below.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court ORDERS the authorized agent of the State of Texas or the County Sheriff to take and deliver Defendant to the Director of the Correctional Institutions Division, TDCJ, for placement in confinement in accordance with this judgment. The Court ORDERS Defendant remanded to the custody of the County Sheriff until the Sheriff can obey the directions in this paragraph. Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or arrange to pay any fines, court costs, reimbursement fees, and restitution due.

This order therefore directs Marcos to pay his fines and costs at a later date—namely, after his release from confinement. *Polanco*, 690 S.W.3d at 433–35; *Sloan*, 676 S.W.3d at 242.

Despite the trial court's order that Marcos pay later, the clerk issued a bill of costs that itemizes the assessment and is signed on behalf of the Harris County District Clerk by a deputy.[169] This signed bill of costs makes the fines, costs, and fees payable now rather than later, and it "obligates" Marcos "to pay the items listed." Tex. Code Crim. Proc. art. 103.001(b); *Jones*, 691 S.W.3d at 679. The bill of costs therefore conflicts with the trial court's judgment.

3.1.4. This Court should remove the assessed fines, costs, and fees from the bill of costs.

This Court may resolve the conflict between the judgment and the bill of costs by modifying the bill of costs to remove the not-yet-payable costs. *See Bruedigam v. State*, No. 07-23-00429-CR, 2024 WL

[168] CR:

[169] CR:756.

2739395, at *2 (Tex. App.—Amarillo May 28, 2024, no pet.) (mem. op., not designated for publication) (ordering clerk to remove costs from the bill of costs in accordance with trial court's order); *Pruitt*, 646 S.W.3d at 883 (court of appeals has authority to modify bill of costs). This Court should modify the bills of costs accordingly.

3.1.5. Other courts have taken to modifying the bills to include a pay-later order, but this is an imperfect solution that is unsupported by either precedent or statute.

The State may argue, as it has in other cases,[170] that this Court should, instead of deleting the costs from the bill, add language to the bill of costs directing that the assessed costs and fees are not payable until Marcos's release from confinement.

Several other appellate courts have adopted this approach in unpublished cases. *See, e.g.*, *Ray v. State*, No. 05-24-00455-CR, 2025 WL 1725788, at *2 (Tex. App.—Dallas June 20, 2025, no pet. h.) (mem. op., not designated for publication); *Wilbanks*, 2025 WL 1657265, at *4; *Ramirez v. State*, No. 02-24-00224-CR, 2025 WL 1350046, at *2–3 (Tex. App.—Fort Worth May 8, 2025, no pet. h.) (mem. op., not designated for publication); *Bartley v. State*, No. 06-24-00052-CR, 2025 WL 915045, at *6 (Tex. App.—Texarkana Mar. 26, 2025, pet. filed) (mem. op., not designated for publication);

[170] *See Campbell v. State*, Nos. 14-24-00551-CR & 14-24-00552-CR, State's Resp. Br. at 50.

Perez v. State, No. 06-24-00078-CR, 2025 WL 732733, at *4 (Tex. App.—Texarkana Mar. 7, 2025, pet. ref'd) (mem. op., not designated for publication).

None of these courts have explained their decision to do so, however. In *Perez*, the first case to add such language to the bill of costs, the Texarkana court did it solely because the State asked it to. 2025 WL 732733, at *4 ("The State concedes that Perez's court costs are not due until he is released from confinement and requests that we modify the bill of costs to reflect that fact.")

Then, in *Bartley*, the Texarkana court simply did it again without giving any reason at all. 2025 WL 915045, at *6. In *Ramirez*, the Fort Worth court simply cited *Bartley*. 2025 WL 1350046, at *3. And in *Wilbanks* and *Ray*, the Dallas court simply cited *Perez*, *Bartley*, and *Ramirez*. 2025 WL 1657265, at *4; 2025 WL 1725788, at *2.

What's missing in these cases is either 1) precedential authority or 2) statutory authorization for such an approach. None of these cases are published; they have no precedential value whatsoever. Tex. R. App. P. 47.7(a). Even worse, there is no statutory provision that authorizes a bill of costs to include a statement showing that the costs are not payable until later. For good reason: the bill of costs isn't issued by the judge—so, unlike the judgment, it cannot order anything under article 42.15. Instead, the bill is issued by the clerk,

and the issuance of the bill by the clerk, by law, makes the costs payable *now*. Tex. Code Crim. Proc. art. 103.001(b).

The bill of costs, *by its existence*, makes the costs payable now. Adding language that the costs are actually payable later would make the bill self-contradictory. There is no good reason—let alone one supported by either precedent or statute—for this Court to take an action that renders a government document self-contradictory. The better solution is for this Court simply to eliminate the conflict between the bill and the judgment by modifying the bill to delete the not-yet-payable costs. *Bruedigam*, 2024 WL 2739395, at *2; *Pruitt*, 646 S.W.3d at 883.

3.2. This Court should delete the fine from the bill.

Notwithstanding the problem that *none* of the assessed fines and costs should be in the bill, the second error in the bill of costs is that the bill includes the $100 child abuse fine.[171] The fine was illegally assessed—and also not orally pronounced—and it should therefore be removed. *Armstrong*, 340 S.W.3d at 767; *Taylor*, 131 S.W.3d at 500; *Triana*, 2024 WL 4595107, at *5.

And even if the fine was legal and orally pronounced, it still shouldn't be in the bill of costs. Fines are punitive and part of the sentence; they are not costs and therefore should not be included in

[171] CR:756.

the bill of costs. *Williams*, 495 S.W.3d at 590–91. This Court should delete the fine from the bill of costs. *Id.*; Tex. R. App. P. 43.2(b), 43.6.

3.3. This Court should remove the improperly assessed reimbursement fees from the bill.

The final error in the bill is that every improperly assessed reimbursement fee (arrest, release, and witness-summoning) that was included in the judgment is also itemized in the bill of costs.[172] Just as this Court should modify the assessments in the judgment to delete the improperly assessed fees, it should modify the bill to delete the same. *Pruitt*, 646 S.W.3d at 883; *Dority*, 631 S.W.3d at 794; *Bryant*, 642 S.W.3d at 850; *Contreras*, 2021 WL 6071640, at *7–8; Tex. R. App. P. 43.2(b), 43.6.

[172] CR:753, 756.

3.4. Summary of Bill Modifications

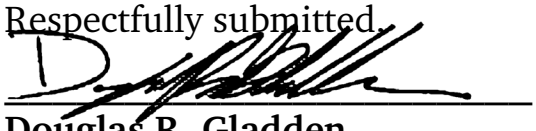
Putting all of this together, in the event that this Court does not delete *all* the costs from the bill of costs, it should modify the bill as follows:

Fee Description	**Amount Assessed**
LEA - Summon Witness	$~~700.00~~ 180.00
Consolidated Court Cost -State	$185.00
Consolidated Court Cost -Local	$105.00
~~Child Abuse Prevention~~	~~$100.00~~
LEA - Capias Execution	$100.00
LEA - Bond Approval Fee	$20.00
LEA - Commitment Fee	$15.00
LEA - Release Fee	$~~15.00~~ 10.00
LEA - Arrest w/out Capias	$~~15.00~~ 10.00
LEA - Summon Jury	$5.00
Assessed Date: 10/26/2024	**Total Amount Assessed: $~~1,255.00~~ 630.00**
	Total Paid: $0.00
	Total Due: $~~1,255.00~~ 630.00

Prayer

Marcos prays that this Honorable Court reverse the trial court's judgment and remand for a new trial in which his right to a unanimous jury verdict is ensured.

Respectfully submitted,



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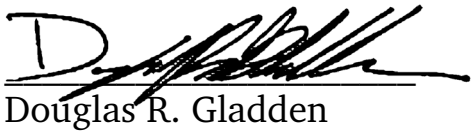

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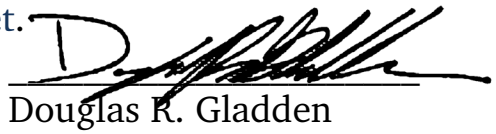

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