NO. 14-24-00219-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

STEPHANIE RAY
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 2471610
From County Criminal Court at Law No. 2
of Harris County, Texas
Hon. Paula Goodhart, Judge Presiding

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Stephanie Ray was convicted of DWI Second.[1] She was assessed a punishment of one year in the county jail.[2] However, the judge suspended Ms. Ray's sentence of confinement and placed her on community supervision for two years.[3] Ms. Ray now appeals.

[1] Clerk's Record (hereinafter C.R.) at 142.
[2] C.R. at 142.
[3] C.R. at 142

STATEMENT REGARDING ORAL ARGUMENT

Ms. Ray respectfully requests that her appellate attorney be permitted to make an oral argument. This appeal involves a question of first impression. The question involves the role of the jury in a DWI-Second case when the defendant chooses to have the judge assess punishment. Oral argument could be a significant help to this Court in deciding this issue.

ISSUE PRESENTED

Issue Number One

DWI (a Class B misdemeanor) becomes DWI Second (a Class A misdemeanor) if the defendant was previously convicted of DWI. Under *Oliva v. State*, the previous-conviction issue is to be litigated during the trial's punishment phase. If the defendant elects to have a jury decide guilt/innocence only, should the jury decide the prior-conviction issue?

STATEMENT OF JURISDICTION

The trial judge certified that the cause being appealed is not a plea bargain case and that Ms. Ray has the right of appeal.[4] This certification is accurate. Generally, the defendant in a criminal action has the right of appeal.[5]

Additionally, a defendant must timely file a notice of appeal to give a court of appeals jurisdiction over an appeal.[6] A defendant's notice of appeal is timely if the notice is filed within 30 days after the day the sentence is imposed or suspended in open court.[7] In this case, Ms. Ray timely filed a notice of appeal on March 21, 2024.[8]

Accordingly, this Court has jurisdiction to hear this appeal.

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[4] C.R. at 149.
[5] Tex. Code Crim. Proc. art. 44.02.
[6] *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996).
[7] Tex. R. App. P. 26.2(a)(1).
[8] C.R. at 156. The notice of appeal is timely because it was filed within 30 days of the date sentence was imposed which was March 7, 2024.

STATEMENT OF PROCEDURAL HISTORY

The trial judge signed and entered the written judgment in this case on March 7, 2024.[9] Ms. Ray timely filed a notice of appeal on May 21, 2024.[10] She did not file a motion for new trial or a motion in arrest of judgment. The judgment is now before this Court on appeal. The district clerk filed the clerk's record on April 29, 2024.[11] The court reporter filed the complete reporter's record on May 13, 2024.[12]

Generally, an appellant's brief must be filed within 30 days after the later of the filing of the clerk's record or the reporter's record.[13] In this case, the reporter's record was filed after the clerk's record. Accordingly, Ms. Ray's brief was due to be filed by June 12, 2024.[14]

Ms. Ray obtained two extensions of time to file her brief. Her current due date is August 28, 2024. Ms. Ray timely filed this brief on August 2, 2024.

[9] C.R. at 142-43.
[10] C.R. at 156.
[11] C.R. at 1.
[12] 4 R.R. at 1.
[13] Tex. R. App. P. 38.6(a).
[14] Because June 8 was a Saturday, the due date was extended to the next business day – Monday, June 10, 2024.

STATEMENT OF FACTS

On August 14, 2023, Stephanie Ray was arrested for driving while intoxicated (DWI).[15] The facts surrounding the arrest are unimportant to the issue in this appeal and will not be discussed further.

The charging instrument in this case is an information.[16] The information contains two paragraphs.[17] The first paragraph alleges that Ms. Ray committed the offense of DWI on or about August 14, 2023.[18] The second paragraph alleges that Ms. Ray had previously been convicted of DWI.[19] Thus, Ms. Ray was actually charged with the Class A misdemeanor offense of DWI Second.[20]

Ms. Ray pleaded not guilty to the charge.[21] Trial was conducted before a jury.[22] The prosecutor read the first paragraph of the information at the beginning of the trial before the jury.[23] Ms. Ray pleaded not guilty to the allegation.[24] Ultimately, the jury found Ms. Ray guilty of DWI.[25] The jury was not charged with making any finding as

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[15] 3 R.R. at 17-18, 40, 110.
[16] C.R. at 8.
[17] C.R. at 8.
[18] C.R. at 8.
[19] C.R. at 8.
[20] *See* Tex. Penal Code §§ 49.04, 49.09(a). The information says the "misdemeanor charge" is "driving while intoxicated." More appropriately, the information should have listed the misdemeanor charge as "DWI Second."
[21] C.R. at 142; 3 R.R. at 5-6.
[22] *See* C.R. at 142; 3 R.R. beginning at 5.
[23] 3 R.R. at 5-6.
[24] 3 R.R. at 6.
[25] C.R. at 141-42; 4 R.R. at 115-16.

to whether Ms. Ray had previously been convicted of DWI. This made sense because the second paragraph of the information had never been read to the jury[26] There was never any mention during the trial that perhaps Ms. Ray had previously been convicted of DWI.

So, the jury found Ms. Ray guilty of the DWI of August 14, 2023. The jury did not find Ms. Ray guilty of DWI Second. Indeed, the jury never had any idea that Ms. Ray may previously have been convicted of DWI. Nonetheless, the written judgment declares that Ms. Ray was convicted of the offense of DWI Second and that the verdict of the jury was guilty.[27] The written judgment gives the impression that the jury found Ms. Ray guilty of DWI Second. But this is not the case. The jury only found Ms. Ray guilty of DWI.

Following the polling of the jurors concerning their DWI verdict,[28] the trial judge told the jurors their service had been concluded.[29] The jurors were then taken out of the courtroom.[30] The trial judge then moved onto the punishment phase of the trial.[31]

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[26] *See* 3 R.R. at 5-6.
[27] C.R. at 142.
[28] 4 R.R. at 116.
[29] 4 R.R. at 116.
[30] 4 R.R. at 116-17.
[31] *See* 4 R.R. at 117.

At punishment, the State announced that "the State and Defense have agreed to stipulate to the alleged prior DWI in the information."[32] The judge then said she would need the parties to "do a written stipulation for me."[33] Next, the judge said:

> All right. Ms. Ray, this jury having found you guilty, we are now moving to the punishment phase of the trial. And there is called an enhancement paragraph in your case, where it is alleged that you have previously been convicted of driving while intoxicated case [sic]. So I'm going to read it and you will enter – your response will either be that it's true or not true. So here it is. It is further presented that before the commission of the alleged offense above[,] on February 23, 2022, the Defendant was convicted of the offense of driving while intoxicated in Cause Number 20-348567 in the County Criminal Court at Law No. 4 of Mongomery County, Texas. Is that allegation true or not true.[34]

Ms. Ray said "[t]hat's true, ma'am."[35] The trial judge then said, "[o]n your plea of true, I will find that to be true."[36]

Ultimately, the trial court assessed Ms. Ray's punishment at "one year in jail that will be probated for a period of two years."[37] No fine was assessed.[38] The court ordered Ms. Ray to perform 12 hours of community service.[39] The court ordered Ms. Ray to "do five days in the Harris County Jail as a condition of [her] probation."[40]

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[32] 4 R.R. at 117.
[33] 4 R.R. at 117.
[34] 4 R.R. at 117-18.
[35] 4 R.R. at 118.
[36] 4 R.R. at 118.
[37] 4 R.R. at 120.
[38] 4 R.R. at 120.
[39] 4 R.R. at 122.
[40] 4 R.R. at 122. Additionally, the trial judge waived Ms. Ray's court costs.

SUMMARY OF THE ARGUMENT

Ms. Ray advances a single issue on appeal.

Ms. Ray asserts that the trial court erred in not having the jury decide the question of whether Ms. Ray had a previous DWI conviction.

ARGUMENT

Issue Number One

DWI (a Class B misdemeanor) becomes DWI Second (a Class A misdemeanor) if the defendant was previously convicted of DWI. Under *Oliva v. State*, the previous-conviction issue is to be litigated during the trial's punishment phase. If the defendant elects to have a jury decide guilt/innocence only, should the jury decide the prior-conviction issue?

Oliva v. State

In 2018, the Texas Court of Criminal Appeals decided *Oliva v. State*.[41] Writing for the majority, Presiding Judge Sharon Keller summarized the issue and the Court's holding as follows:

> Under Penal Code § 49.09(b), the existence of two prior convictions for DWI (Driving While Intoxicated) elevates a third DWI offense from a Class B misdemeanor to a third degree felony. We have held that the existence of these two prior convictions is a jurisdictional fact needed to establish felony status to make the offense triable in district court and is an element of the offense.[42] Today we address the status of [Texas Penal Code] § 49.09(a), which provides that the existence of a single prior conviction elevates a second DWI offense from a Class B misdemeanor to a Class A misdemeanor. Is the existence of a single prior conviction an element of the offense or a punishment issue? The parties agree that the existence of a single prior conviction is an element of the offense. We disagree and hold that, unlike the existence of two prior convictions for felony DWI, which is an element of the offense of felony DWI, the existence of a single prior conviction for misdemeanor DWI is a punishment issue.[43]

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[41] *Oliva v. State,* 548 S.W.3d 518 (Tex. Crim. App. 2018). Undersigned counsel served as appellate counsel for Mr. Oliva and orally argued the case before the Court of Criminal Appeals.

[42] *See Ex parte Benson*, 459 S.W.3d 67, 75-76 (Tex. Crim. App. 2015).

[43] *Oliva v. State*, 548 S.W.3d at 519-20.

Based on its holding, the Court approved the procedure in the trial court which Presiding Judge Keller described as follows:

> Appellant was charged by information with DWI. The information contained two paragraphs: the first alleged the commission of the current DWI and the second alleged a prior DWI conviction. The focus of the guilt stage of trial was solely on the first paragraph. The prior-conviction allegation was not read to the jury at the guilt stage, no evidence of the prior conviction was offered at the guilt stage, and there was no mention of a prior conviction in the guilt-stage jury instructions.
>
> At the punishment stage, the State read the prior-conviction allegation to the jury and introduced evidence of a prior DWI conviction. The jury found the prior-conviction allegation to be true and assessed a punishment at 180 days' confinement. The judgment labeled Appellant's current conviction as "DWI 2nd" and the degree of offense as "Class A Misdemeanor."[44]

An important statute that factored into the Court's conclusion is Article 36.01 of the Code of Criminal Procedure. The statute concerns when prior-conviction allegations may be read at trial. The language of the statute, in pertinent part, is as follows:

> When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.[45]

The *Oliva* Court gave great deference to this statue in reaching its conclusion. And the Court recognized the Legislature's wisdom in enacting Article 36.01, saying:

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[44] *Id.* at 520.

[45] The *Oliva* Court set out this statute on page 521 of its opinion.

> Before the enactment of Article 36.01, this Court upheld the practice of allowing prior convictions alleged in the charging instrument to be read to the jury before it decided the issue of guilt. The legislature's obvious purpose in changing the practice was the "prevention of the extreme prejudice which would inevitably result" in announcing the prior convictions before guilt had been decided.[46]

***Oliva* is clear that prior-conviction allegations must be read at punishment**

An important takeaway from *Oliva* is that in DWI-Second cases, the prior-conviction allegation is <u>not</u> to be read to the jury at the guilt stage. But the prior-conviction allegation must still be read. It must be read at the punishment phase.

Who must read the prior-conviction allegation?

In the *Oliva* case, the prosecutor read the prior-conviction allegation at punishment. The Court of Criminal Appeals noted this as follows:

> At the punishment stage, the State read the prior-conviction allegation to the jury . . . .[47]

The opinion does not say that <u>the State</u> must read the prior-conviction allegation. But that is what happened in *Oliva*. And it only makes sense that the State should read the allegation. This is consistent with Article 36.01. Part of Article 36.01 was set out above. But a little more of the statute (including the portion set out above) is reproduced below (with emphasis added):

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[46] *Oliva v. State*, 548 S.W.3d at 529 (internal footnotes omitted).
[47] *Id.* at 520.

> (a) A jury being impaneled in any criminal action, except as provided by Subsection (b) of this article, the cause shall proceed in the following order:
>
> > 1. The indictment or information **shall be read to the jury by the attorney prosecuting**. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.01.

The emphasized language above makes it clear that the prosecutor (i.e., the State) is the actor who is supposed to read the prior-conviction allegation.

To whom is the prior-conviction allegation to be read?

The *Oliva* opinion does not say the prior-conviction allegation must be read to the jury. But in *Oliva*, the prosecutor, at the punishment phase, did read the prior-conviction allegation to the jury.[48] This was consistent with Article 36.01 which concerns jury trials. And the *Oliva* case involved a jury trial at both the guilt stage and the punishment phase as the Court of Criminal Appeals disclosed:

> At the punishment stage, the State read the prior-conviction allegation to the jury and introduced evidence of a prior DWI conviction. The jury found the prior-conviction allegation to be true and assessed punishment at 180 days' confinement.[49]

[48] *Oliva v. State*, 548 S.W.3d at 520.
[49] *Id.*

Who is to make a finding as to the prior-conviction allegation?

In the *Oliva* case, the jury found the prior-conviction allegation to be true.[50] But the opinion does not say that the jury must make this finding.

Oliva does not address the factual situation in the current case

Oliva deals with a situation in which the defendant chose to have the jury assess punishment. Thus, *Oliva* does not speak to situations in which the defendant chooses to have the judge assess punishment. And this is precisely the situation we have in the current case. Ms. Ray chose to have a jury trial on the question of her guilt. But she did not choose to have the jury assess punishment.[51]

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[50] *Id.* ("The jury found the prior-conviction allegation to be true . . . .").

[51] This choice was essentially a choice made by default. If Ms. Ray wanted the jury to assess punishment, she should have filed an election to have the jury assess punishment. She filed no such election. Thus, it became the responsibility of the trial judge to assess punishment. *See* Tex. Code Crim. Proc. art. 37.07, Sec. 1(b) which reads in its entirety as follows:

> Except as provided by Article 37.071 or 37.072, **if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense**; provided, however, that (1) in any criminal action where the jury may recommend community supervision and the defendant filed his sworn motion for community supervision before trial began, and (2) in other cases where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury, except as provided in Section 3(c) of this article and in Article 44.29. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

Tex. Code Crim. Proc. art. 37.07, Sec. 1(b) (emphasis added).

The punishment phase of trial in the case at bar

In the current case, the punishment phase of trial was fairly short – it is recorded on less than eight full pages of the court reporter's record.[52] The punishment phase was conducted outside the presence of the jury.[53] The judge initially asked if either side had any evidence to present on the matter of punishment.[54] The prosecutor informed the judge that "the State and Defense have agreed to stipulate to the alleged prior DWI in the information."[55] In response, the trial judge said "Okay. So I'm going to need you to do a written stipulation for me and then we'll address that after I talk to the jury."[56] The judge then addressed Ms. Ray and said:

> All right. Ms. Ray, this jury having found you guilty, we are now moving to the punishment phase of the trial. And there is what is called an enhancement paragraph in your case, where it is alleged that you have previously been convicted of driving while intoxicated case [sic]. So I'm going to read it and you will enter – your response will either be that it's true or not true. So here it is. It is further presented that before the commission of alleged offense above[,] on February 23, 2022, the Defendant was convicted of the offense of driving while intoxicated in Cause Number 20-348567 in the County Criminal Court at Law No. 4 of Montgomery County, Texas. Is that allegation true or not true?[57]

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[52] *See* 4 R.R. at 117-24.

[53] *See* 4 R.R. at 116-17. Just before the start of the punishment phase, the judge had sent the jury back to the jury room after saying:

> Okay. Gentlemen, you may be seated. This concludes your service. And so I'll ask you to go back to the jury room one last time. I'll be there shortly with work excuse forms and to answer any questions that you have. All right. You are free to go with the bailiff.

[54] 4 R.R. at 117.

[55] 4 R.R. at 117.

[56] 4 R.R. at 117.

[57] 4 R.R. at 117-18.

Ms. Ray said "[t]hat's true, ma'am."[58] The trial judge then responded by saying, "[o]n your plea of true, I will find that to be true."[59]

Questions raised by the punishment-phase proceedings in this case

The first question raised is whether the judge should have read the prior-conviction allegation herself (as opposed to having the prosecutor read it). Article 36.01(a) says "the information shall be read to the jury by the attorney prosecuting."[60] This language assumes, of course, there is a jury present to hear the reading. In *Oliva*, there was a jury present. The Court of Criminal Appeals approved the prosecutor's reading of the prior-conviction allegation to the jury.[61] But *Oliva* does not address whether the prosecutor must read the prior-conviction allegation when no jury is present. In this case, a jury had been present. But before the punishment phase began, the trial judge sent the jurors back to the jury room and told them their service had been concluded.[62]

The second question raised is whether the prior-conviction allegation should have been read not only to Ms. Ray, but to the jury as well. Article 36.01(a) says "the

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[58] 4 R.R. at 118.
[59] 4 R.R. at 118.
[60] Tex. Code Crim. Proc. art. 36.01(a) (emphasis added).
[61] *See Oliva v. State*, 548 S.W.3d at 520 ("[a]t the punishment stage, the State read the prior-conviction allegation to the jury") and at 534 ("we hold that the litigation of the prior-conviction allegation at the punishment stage of trial was proper").
[62] *See* Footnotes 29 and 30.

information shall be read to the jury by the attorney prosecuting."[63] This language assumes, of course, there is a jury present to hear the reading. In *Oliva*, there was a jury present. The Court of Criminal Appeals approved the prosecutor's reading of the prior-conviction allegation to the jury.[64] But *Oliva* does not address whether the prior-conviction allegation must be read to the jury when the defendant has elected to go to the judge for punishment. That is the situation we have in the current case.

The third question raised is whether the jury (instead of the judge) should have been the factfinder regarding the allegation of a prior DWI conviction. *Oliva* does not answer this question because Mr. Oliva had elected for the jury to be the factfinder at both stages of trial. So, this question was not before the Court of Criminal Appeals.

What becomes readily apparent is that the answers to all three of these questions hinge on one thing. That one thing is whether, in a case in which the defendant desires a jury only in guilt/innocence, the jury must decide the prior-conviction allegation. The *Oliva* Court said the question of whether the defendant was previously convicted of DWI is a punishment issue."[65] In other words, it is not an element of the offense.[66] Nevertheless, the existence of a prior DWI offense is something that must be found in

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[63] Tex. Code Crim. Proc. art. 36.01(a) (emphasis added).
[64] *See Oliva v. State*, 548 S.W.3d at 520 ("[a]t the punishment stage, the State read the prior-conviction allegation to the jury") and at 534 ("we hold that the litigation of the prior-conviction allegation at the punishment stage of trial was proper").
[65] *Oliva v. State*, 548 S.W.3d at 518.
[66] *See id.*

order for a defendant to be guilty of DWI Second. That sounds like an issue that concerns guilt/innocence as opposed to punishment.

Oliva does not address whether the jury should decide the prior-conviction allegation when the defendant has chosen to have the judge assess punishment. But that is the situation in the current case. So, we turn to other authorities for guidance.

There are no other authorities addressing this issue

According to a Westlaw search on August 1, 2024, the *Oliva* opinion had been cited in 90 other cases. Undersigned counsel has examined every one of these 90 cases. None of them address the question of whether the jury should decide the prior-conviction allegation when the defendant elects to have the judge assess punishment. The question appears to be one of first impression.

It appears that the trial court erred

Based on *Oliva* and Article 36.01, it appears that the trial judge erred in her handling of the punishment phase of the trial in the current case.

Specifically, the_trial judge erred in dismissing the jury and deciding the prior-conviction issue herself. The jury should have been directed to decide whether Ms. Ray had previously been convicted of DWI. The *Oliva* Court said the prior-conviction

question is a punishment issue.[67] But it is nonetheless a question that the Legislature envisions being presented to the jury. Article 36.01(a) says:

> A jury being impaneled in any criminal action, except as provided by subsection (b) of this article, the cause shall proceed in the following order:
>
> > 1. The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.

A jury was impaneled in the current case. This being the case, the trial court should have followed Article 36.01(a). The trial court should have kept the jury around to decide the prior-conviction issue. The trial court erred in dismissing the jury and choosing to decide the issue herself.

The trial judge should have treated the prior-conviction issue with the same seriousness that she treated the new-DWI issue. She should have had the prosecutor read the second paragraph instead of reading it herself. The text of Article 36.01(a) is clear: "[t]he indictment or information shall be read to the jury by the attorney prosecuting." Certainly, that directive applies when the charging instrument is read

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[67] *Oliva v. State*, 548 S.W.3d at 519-20 ("the existence of a single prior conviction for misdemeanor DWI is a punishment issue."). But, while it may be a "punishment issue," it is still an "offense elevating allegation" which is "an allegation used to elevate an offense." *State v. Lozano-Pelayo*, 598 S.W.3d 407, 415 (Tex. App.—Amarillo 2020, no pet.) (Pirtle, J., concurring). This is as opposed to "an allegation used to enhance a range of punishment." *Id.* It seems logical that an "offense elevating enhancement" should be evaluated by the jury that determines the question of guilt and innocence.

during the guilt/innocence phase of trial. But the directive appears to apply equally to the reading of the prior-conviction allegation during the trial's punishment phase. That did not happen here.

The trial court mishandled the punishment phase of trial. This was an error. Ms. Ray was harmed by it. She was convicted of a Class A misdemeanor (DWI Second) even though the jury only found her guilty of a Class B misdemeanor (regular DWI).

PRAYER

Ms. Ray asks this Court to grant her sole issue and reverse the trial court's judgment finding her guilty of DWI Second. She asks that this Court remand the case to the trial court with instructions to enter a judgment of conviction for regular DWI. She asks that the trial court be further instructed to hold a new punishment hearing for the DWI conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by the Texas Rules of Appellate Procedure,[68] I certify that this brief contains 3,716 words. This word-count is calculated by the Microsoft Word program used to prepare this brief. The word-count does not include those portions of the brief exempted from the word-count requirement under the Texas Rules of Appellate Procedure.[69] The number of words generally permitted for this type of computer-generated brief (a brief in an appellate court) is 15,000.[70]

/s/ Ted Wood
TED WOOD
Assistant Public Defender
Counsel for Appellant

[68] Tex. R. App. P. 9.4(i)(3).
[69] *See* Tex. R. App. P. 9.4(i)(1).
[70] Tex. R. App. P. 9.4(i)(2)(B).

CERTIFICATE OF SERVICE

I certify that on August 2, 2024, I provided this brief to Jessica Caird in the Harris County District Attorney's Office via the EFILETEXAS.gov e-filing system. This service is required by the Texas Rules of Appellate Procedure.[71]

/s/ Ted Wood
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[71] *See* Tex. R. App. P. 9.5(a).

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