No. 01-24-00874-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS
AT HOUSTON

CARLOS JAMES MURILLO
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1664088
From the 174th District Court of Harris County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:	Hon. Hazel Jones 174th District Court Harris County, Texas 1201 Franklin Street, 15th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

On April 3, 2020, a Harris County grand jury returned an indictment charging Appellant with the felony offense of possession with intent to deliver a controlled substance alleged to have occurred on or about February 10, 2020. (C.R. at 12). On April 30, 2020, Appellant entered into a plea bargain where he was placed on deferred adjudication for five years. (C.R. at 15-32, 37). On October 17, 2023, the State filed their initial motion to adjudicate guilt. (C.R. at 80-81). On July 19, 2024, the State filed their First Amended Motion to Adjudicate Guilt. (C.R. at 90-92).

On October 29, 2024, a hearing regarding the First Amended Motion to Adjudicate was conducted in the trial court. (1 R.R.). After hearing the arguments of the parties, the trial court adjudicated Appellant guilty and assessed his punishment at five years in the Texas Department of Criminal Justice – Institutional Division. (1 R.R. at 88-89, 120-121; C.R. at 131-134). The trial court certified Appellant's right of appeal and the Appellant timely filed his notice of appeal on October 29, 2024. (C.R. at 100-102). No motion for new trial was filed.

STATEMENT REGARDING ORAL ARGUMENT

Undersigned counsel does not request oral argument. However, should the State of Texas or the Court request oral argument, Appellant requests the opportunity to participate in oral argument.

ISSUES PRESENTED

1. **Whether the trial court reversibly erred when it admitted State's Exhibit 3 that contained statements from Appellant's probation officers in Florida in violation of the Confrontation Clauses under the Sixth Amendment to the U.S. Constitution and Article 1, Section 10 of the Texas Constitution?**

2. **Whether the trial court reversibly erred when it admitted State's Exhibit 3 that contained statements from Appellant's probation officers in Florida in violation of Appellant's Due Process rights to confront and cross-examine witnesses?**

3. **Whether the trial court reversibly erred when it admitted State's Exhibit 3 that contained statements from Appellant's probation officers in Florida over Appellant's hearsay objections?**

4. **Whether the trial court abused its discretion when it revoked Appellant's community supervision?**

5. **Whether the trial court's judgment should be modified to reflect the actual conditions of community supervision that the trial court found to be true?**

STATEMENT OF FACTS

On April 30, 2020, Appellant entered into a plea bargain where he was placed on deferred adjudication for five years. (C.R. at 15-32, 37). Appellant was required to comply with numerous conditions while on deferred adjudication. (C.R. at 29-34) (original, first, and second amended conditions). On July 19, 2024, the State filed their First Amended Motion to Adjudicate Guilt. (C.R. at 90-92). Appellant pled "not true" to each of these allegations:

> The State would further show the said defendant did then and there violate terms and conditions of community supervision by using, possessing, or consuming an illegal drug; to wit, the defendant did use, possess, or consumed an illegal drug. Specifically, the defendant tested positive and confirmed on the following dates for the drugs specified: May 31, 2024, benzoylengonine-cocaine metabolite.
>
> The State would further show the said defendant did then and there violate terms and conditions of community supervision by failing to participate in the HCCSCD Community Service Restitution Program; to wit, the defendant was ordered to perform CSR hours as by CSR due date directed by HCCSCD CSRP policy. The defendant failed to perform said hours as directed.
>
> The State would further show the said defendant did the and there violate terms and conditions of community supervision by failing to attend intensive outpatient treatment/supportive outpatient treatment program until successfully completed.

(1 R.R. at 9-10)

Esperanza Vitela is a transfer officer, probation officer for Harris County. (1 R.R. at 12). She was assigned Appellant's case in October 2023. (1 R.R. at 40). During her testimony, Ms. Vitela referred to Appellant's chronologicals, as Appellant was being supervised in Florida. (1 R.R. at 12; 2 R.R. State's Ex. 3). Chronologicals were the records of all the events and any communication for the Appellant while on supervision. (1 R.R. at 12). The events from Florida could be sent whenever Florida felt there was a violation of any sort or any update in the way Appellant was reporting. (1 R.R. at 40). Ms. Vitela did not receive the report immediately due to the Interstate Compact. (1 R.R. at 40-41). The reports starting from October 2023 indicated that Appellant was not compliant with his community service and she did not receive any proof from the Appellant or from anyone else that he had completed any community service hours. (1 R.R. at 43). The reports from Florida also indicated that Appellant was not compliant with the outpatient treatment program and did not complete it as of July 2024. (1 R.R. at 43-44). An entry dated September 13, 2022 indicated that Appellant reported that Drug Abuse Foundation ("DAF") was not helping him due to some medication he was taking and he switched to Florida Treatment Centers in June 2022 where he remained. (1 R.R. at 49-50; 2

R.R. State's Ex. 3 at p. 24).[1] Ms. Vitel admitted that Harris County did not have a position on which program Appellant attended; Appellant just had to attend intensive outpatient treatment followed by supportive outpatient treatment. (1 R.R. at 51). However, she also read from the chornologicals that "although the subject is enrolled in an outpatient program, he left DAF without permission and did not successfully complete it" and testified that Appellant did not complete it. (1 R.R. at 51). To Ms. Vitel's knowledge, the State of Florida reported to them in the last violation report that Appellant did not complete outpatient treatment. (1 R.R. at 53). She also agreed that the officer also reported that Appellant left the DAF without permission and did not successfully complete their program. (1 R.R. at 53, 57-58). In her experience, when a defendant has terminated their treatment, the same thing happens. They receive reports with the violation stating that they have stopped their reporting or are being discharged unsuccessfully. (1 R.R. at 57). A sample from the Appellant collected on May 31, 2024 showed a positive result for benzoylecgonine-cocaine. (1 R.R. at 36-37; 2 R.R. State's Ex. 4).

[1] For reference, Appellant cites to the specific page number from the exhibit volume as the chronologicals contain no internal page numbers.

Appellant lived in West Palm Beach, Florida for the majority of his life. (1 R.R. at 62). He recalled that he was placed on probation in April of 2020. (1 R.R. at 63). Appellant testified that he was addicted to opiates, heroin mostly. (1 R.R. at 64). As part of his receiving probation, Appellant's conditions were to attend outpatient treatment, to pay fees, to not use drugs or alcohol, and to complete community service hours. (1 R.R. at 64). Appellant completed SATF, YMAC, in August of 2020 and was released in December of 2020. (1 R.R. at 64). Appellant went to Florida under the interstate compact after completing SATF. (1 R.R. at 64-65). In Florida, Appellant testified that the information he received was the same paperwork that he received in Harris County regarding outpatient and things of that nature. (1 R.R. at 65). Everything he was supposed to do on probation was a copy of what he received in Harris County. (1 R.R. at 65). In Florida, Appellant's first failed drug test in 2022 is when he started receiving outpatient treatment at DAF. (1 R.R. at 65-66).[2] Appellant testified that he went there for about seven months where he found the treatment helpful. (1 R.R. at 66-67). The program consisted of roughly about six to eight hours a day of intensive inpatient classes, paperwork,

[2] Appellant also testified that he tested positive for medically prescribed marijuana while in Florida. (1 R.R. at 76).

things of that nature. (1 R.R. at 67). Appellant testified he did everything he was supposed to do there and it was the program that kept him there for six months. (1 R.R. at 67). Afterwards, probation ordered him to do intensive outpatient treatment once he got released from DAF inpatient treatment. (1 R.R. at 67-68). Appellant then attended outpatient treatment at DAF. (1 R.R. at 68). He believed he was there for a month or two, as once he arrived it was the same curriculum that he had learned during the inpatient treatment. (1 R.R. at 68). The main reason Appellant decided to go to a different treatment center was because DAF did not allowed medicated assisted treatment. (1 R.R. at 68). He discussed his issues with DAF with probation. (1 R.R. at 77). Appellant wanted to stay sober and went to Florida Treatment Center. (1 R.R. at 69). That program was an IOP, intensive outpatient program. (1 R.R. at 69). He attended daily from the time he left the DAF up until the date of his revocation of probation or the date that he got arrested. (1 R.R. at 70-71). Appellant felt the treatment was successful in keeping him off of heroin, but he testified that he failed for cocaine in May or June of 2024. (1 R.R. at 70).[3] Appellant notified his

[3] On cross-examination, Appellant remembered taking a drug test on May 31, 2024 and testing positive for cocaine. (1 R.R. at 78). He then agreed that State's Exhibit 4 was his drug test. (1 R.R. at 78).

Florida probation officer that he was attending at the Florida Treatment Center and they did not tell him to stop going there and return to DAF. (1 R.R. at 71, 78-79). He found out his probation was revoked when he was arrested. (1 R.R. at 71).

At the conclusion of the hearing, the trial court orally found the following violations true: Condition number 2 by a preponderance of the evidence through cross-examination of the defendant, and condition number 19, attend intensive outpatient program and/or supportive outpatient program and aftercare until successfully completed or designated by the Court. (1 R.R. at 88).

SUMMARY OF THE ARGUMENT

Appellant contends that the trial court erred by admitting State's Exhibit 3, the chronologicals, over Appellant's Confrontation Clause, Due Process, and hearsay objections. Appellant contends that the Confrontation Clause applies in a proceeding to adjudicate guilt, as such a proceeding is part of the "criminal proceeding" for purposes of the Sixth Amendment and Article 1, Section 10 of the Texas Constitution. The chronologicals documented numerous instances from Florida probation officers where Appellant allegedly violated the terms of his supervision. No one from the

State of Florida with personal knowledge of these entries testified during the adjudication hearing. As Ms. Varela admitted, she had no personal knowledge over the events that allegedly occurred in Florida. She had to rely on these reports from Florida in order to testify that Appellant was not complying with the treatment conditions of his probation. As such, the statements from the Florida probation officers describing the various ways that Appellant allegedly was violating the conditions of his deferred adjudication were testimonial. The statements were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a potential revocation hearing. In addition, these statements were hearsay and were not admissible as a present sense impression. As a result, Appellant suffered harm due to the admission of the chronologicals.

In addition, Appellant contends that the trial court abused its discretion in revoking Appellant's community supervision. To say that Appellant violated a condition of his community supervision by failing to successfully complete an outpatient treatment program when the only reason he did not was because he was arrested for alleged probation

violations would offend due process as this would be a wholly inappropriate reason for the trial court to conclude he violated this condition.

Finally, should this Court overrule all of Appellant's merits issues, he contends that the trial court's judgment should be modified to list the actual violations of his deferred adjudication it found Appellant committed.

ARGUMENT

1. Whether the trial court reversibly erred when it admitted State's Exhibit 3 that contained statements from Appellant's probation officers in Florida in violation of the Confrontation Clauses under the Sixth Amendment to the U.S. Constitution and Article 1, Section 10 of the Texas Constitution?

A. Applicable Law

"In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. CONST. AMEND. VI. See also TEX. CONST. ART. I, § 10. The Confrontation Clause "provides a simple yet unforgiving rule: the State may not introduce a testimonial hearsay statement unless (1) the declarant is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the declarant." *Trigo v. State*, 485 S.W.3d 603, 609-610 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), quoting *Lee v. State*, 418 S.W.3d 892, (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). "The main purpose behind the Confrontation Clause

is to secure for the opposing party the opportunity of cross-examination because that is 'the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Johnson v. State*, 490 S.W.3d 895, 909 (Tex. Crim. App. 2016), quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974). "The Confrontation Clause does not prohibit *any* use of testimonial hearsay; it only prohibits the use of testimonial hearsay to prove the truth of the matter asserted." *Wood v. State*, 299 S.W.3d 200, 213 (Tex. App.—Austin 2009, pet. ref'd), citing *Crawford v. Washington*, 541 U.S. 36, 59, n. 9 (2004). "'Testimonial' statements include those statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Williams v. State*, 513 S.W.3d 619, 637 (Tex. App.—Fort Worth 2016, pet. ref'd), citing *Crawford*, 541 U.S. at 52 and *Paredes v. State*, 462 S.W.3d 510, 514 (Tex. Crim. App. 2015). "The Court of Criminal Appeals has summarized three kinds of testimonial statements: (1) ex parte in-court testimony or its functional equivalent, i.e., pretrial statements that declarants would expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, or prior testimony; and (3) statements that were made under

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Trigo*, 485 S.W.3d at 610 (internal quotations omitted), quoting *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010). In regards to nontestimonial versus testimonial statements, the U.S. Supreme Court has observed:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006)

B. Standard of Review

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Pittman v. State*, 321 S.W.3d 565, 572-573 (Tex. App.—Houston [14th Dist.] 2010, no pet). "The test for whether the trial court abused its discretion is whether the action was arbitrary or unreasonable." *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). "An appellate court should not reverse a trial judge whose ruling is within the zone of reasonable disagreement." *Id*. However, whether a statement is testimonial

or non-testimonial is reviewed de novo. *Wall v. State*, 184 S.W.3d 730, 742 (Tex. Crim. App. 2006).

C. Analysis

During the adjudication hearing, the State sought to admit Appellant's chronologicals, records of all the events, any communication specifically for the Appellant. (1 R.R. at 13). Appellant's trial counsel lodged numerous objections to this exhibit. (1 R.R. at 14-35). One of those was a Confrontation Clause objection. (1 R.R. at 27) ("The next objection is going to be that State's Exhibit 3 violates my client's confrontation clause rights under the Texas and United States Constitutions. There are many testimonial statements from his probation officer -- from his alleged probation officer in Florida, and they're being used here in court against him. He has the right to confront that witness before her testimonial statements are admitted against him."); (1 R.R. at 30) ("The defense's argument would be that this is clearly a criminal proceeding to send my client to possibly up to life in prison. He should have the rights afforded to him by the Constitution including the right not to testify, the right to due process, and the right to confront the witnesses against him."). In support, Appellant's trial counsel relied upon the Court of Criminal Appeals' decision

in *Ex parte Doan* and alluded to Justice Keyes's concurring opinion in *Torres v. State*. See *Ex parte Doan*, 369 S.W.3d 205, 212 (Tex. Crim. App. 2012) and *Torres v. State*, 617 S.W.3d 95 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd). The State, relying upon the Fourteenth Court of Appeals' decision in *Trevino*, contended that the Confrontation Clause did not apply to the proceedings. See *Trevino v. State*, 218 S.W.3d 234 (Tex. App.—Houston [14th Dist.] 2007, no pet).[4] Ultimately, the trial court overruled Appellant's objection to the chronologicals and granted Appellant a running objection. (1 R.R. at 33).

The chronologicals documented numerous instances from Florida probation officers of Appellant allegedly violating the terms of his supervision. (2 R.R. State's Ex. 3). One entry from Florida stated:

> The offender has been non-compliant with conditions of probation. The offender has been instructed multiple times on conditions. The offender does not report when instructed, the offender was placed on GPS/EM on 04/17/2024 and has had 12 GPS violations to date. The offender tested positive for cocaine on 06/8/2024. The offender has not completed required treatment or community service hours.

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[4] As discussed *infra*, the Fourteenth Court of Appeals in *Hughes v. State* expressly disavowed its decision in *Trevino* as contrary to the Court of Criminal Appeals' decision in *Ex parte Doan*. See *Hughes v. State*, 651 S.W.3d 461, 467 n. 2 (Tex. App.—Houston [14th Dist.] 2022), *aff'd on other grounds*, 691 S.W.3d 504 (Tex. Crim. App. 2024). Neither the State nor Appellant's trial counsel mentioned *Hughes* during their respective arguments.

…

The offender has been non-compliant with conditions of probation. The offender has been instructed multiple times on conditions. The offender does not report when instructed, nor does he report biweekly for drug screening. The offender was placed on GPS/EM on 04/17/2024 and has had 12 GPS violations to date. The offender tested positive for cocaine on 06/8/2024 and denied any usage. The offender has not completed required treatment or community service hours. The State of Florida has sent 7 progress reports notifying Texas of the offenders repeated behavior.

(2 R.R. State's Ex. 3 at pp. 15-16)

Other notable entries from the State of Florida stated:

PR was received from FL and they report:

This officer has sent multiple reports notifying Texas of offender continued disregard for supervision. The offender was issued a warrant and taken into custody 12/19/23 however sending state never picked the offender up from Florida so he was released.

A warrant was issued for violation/noncompliance of probation and the offender was taken into custody 12/19/23, but Texas did not extradite. The offender is still not in compliance with imposed conditions of Outpatient Substance Abuse and Biweekly Drug testing. The offender was instructed report on 03/1/2024 and has yet to report for the month. The offender continues to show a disregard for supervision. Therefore, Florida is imposing weekly reporting for 6 weeks and electronic monitoring to ensure we can properly supervise him.

…

09/13/2022 PROGRESS REPORT

CSO received progress report from the State of Florida which indicates that, “On 03/28/22, the offender was enrolled in Outpatient Drug Treatment, at Drug Abuse Foundation, which he did not complete. He reported that DAF was not helping him, due to some medication he was taking. He switched to Florida Treatment Centers in 2022 and has remained there in Outpatient Treatment. This individual enrolled in Maintenance Assistant Treatment (MAT), where he takes 120mg of methadone daily, and his counselor, Seeta Bhaggan reported via a progress report and a telephone conversation with her on 07/27/22, when she reported that the offender attends daily and actively participates in treatment. Although the subject is enrolled in an Outpatient treatment program, he left Drug Abuse Foundation, without permission and did not successfully complete it. Note: The offender maintained that he completed all treatment while in Texas; however Florida does not have any documentation of this.

On 8/2/21, the offender’s previous probation officer, submitted a progress report stating the offender testing positive for extended opiates and cocaine. He recommended a substance abuse evaluation and twice a month drug testing. The offender has successfully completed residential treatment and is enrolled in outpatient treatment, at a treatment center other than Drug Abuse Foundation, where he was instructed to attend. This individual did not discuss the matter or issues he was having with our office, he just quit going to DAF and enrolled in Central Florida Treatment Centers. As a result of his treatment decisions, his mother has contacted our office to complain that her son has recently overdosed and she has suspected him using for some months now. The offender has been tested multiple times at his probation office and his results have been negative, excluding marijuana, for which he has a medical marijuana card that expires today, 8/9/22. His mother reported to the officer’s supervision that her son has also attempted suicide, in the past, along with his drug usage. At this point, this officer would recommend if the State of Texas is not inclined to remand the

> offender, that he be required to undergo a substance abuse and mental health evaluation and successfully complete any recommended treatment, continue twice per month drug testing and enter and successfully complete a residential substance abuse treatment program and any aftercare that is recommended. The offender is not allowed to leave the treatment facility without the consent of Florida Probation or the State of Texas. All other conditions are to remain the same.

(2 R.R. State's Ex. 3, p. 17, 24)

1) The Confrontation Clause applies in an adjudication proceeding, as such a proceeding is part of the "criminal proceeding" for purposes of the Sixth Amendment and Article 1, Section 10 of the Texas Constitution

In *Ex parte Doan*, the Court of Criminal Appeals determined that "[c]ommunity supervision revocation proceedings are not administrative hearings' they are judicial proceedings, to be governed by the rules established to govern judicial proceedings." *Ex parte Doan*, 369 S.W.3d 205, 212 (Tex. Crim. App. 2012). In reaching this determination, the Court noted:

> A community supervision revocation proceeding in Texas bears little resemblance to the administrative hearing described in *Scarpelli*. In Texas, the State is represented by a prosecutor, the defendant does have a right to counsel, the hearing is before the judge, formal rules of evidence do apply, and there may be appeal directly to a court of appeals. They are conducted entirely within the judicial branch. The Rules of Evidence and the exclusionary rule to bar illegally seized evidence apply fully in a Texas probation revocation hearing. Indeed, aside from the burden of proof required to prove a community-supervision

> violation (preponderance of the evidence, which is lower than the burden of proof beyond a reasonable doubt that is required to prove a new criminal offense), there are few procedural differences between a Texas criminal trial and a Texas community-supervision revocation proceeding.

Id. at 210

Prior to the Court of Criminal Appeals' decision in *Doan*, numerous appellate courts determined that the Confrontation Clause does not apply in adjudication proceedings. See *Trevino v. State*, 218 S.W.3d 234 (Tex. App.—Houston [14th Dist.] 2007, no pet); *Mauro v. State*, 235 S.W.3d 374 (Tex. App.—Eastland 2007, pet. ref'd); *Smart v. State*, 153 S.W.3d 118 (Tex. App.—Beaumont 2004, pet. ref'd); and *Wisser v. State*, 350 S.W.3d 161 (Tex. App.—San Antonio 2011, no pet.). Post *Doan*, several appellate courts have continued to hold that the Confrontation Clause does not apply in adjudication proceedings. See *Guillory v. State*, 652 S.W.3d 923 (Tex. App.—Eastland 2022, pet. ref'd); *Olabode v. State*, 575 S.W.3d 878 (Tex. App.—Dallas 2019, pet. ref'd); and *Pickens v. State*, No. 02-17-00050-CR, 2018 Tex. App. LEXIS 5528 (Tex. App.—Fort Worth July 19, 2018, no pet.) (mem. op., not designated for publication). However, the Fourteenth Court of Appeals, the Corpus Christi Court of Appeals, and the Texarkana Court of Appeals have concluded that the Confrontation Clause applies during

revocation proceedings post-*Doan*. See *Hughes v. State*, 651 S.W.3d 461, 467 n. 2 (Tex. App.—Houston [14th Dist.] 2022), *aff'd on other grounds*, 691 S.W.3d 504 (Tex. Crim. App. 2024) (noting that its decision in *Trevino* was contrary to Court of Criminal Appeals' decision in *Ex parte Doan*); *Rucker v. State*, No. 13-22-00093-CR, 2022 Tex. App. LEXIS 6018 at *9-11 (Tex. App.—Corpus Christi – Edinburg Aug. 18, 2022, no pet.) (mem. op., not designated for publication); and *Cunningham v. State*, 673 S.W.3d 280, 291-292 (Tex. App.—Texarkana 2023, no pet.). This Court has not directly addressed whether the confrontation clause applies in a revocation proceeding. See e.g. *Rico v. State*, No. 01-21-00051-CR, 2022 Tex. App. LEXIS 4091 at*6-8 (Tex. App.—Houston [1st Dist.] June 16, 2022, pet. ref'd) (mem. op., not designated for publication), quoting *Torres v. State*, 617 S.W.3d 95, 101 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd). Appellant urges this Court to determine that the Confrontation Clause under both the Federal and Texas Constitutions applies during revocation proceedings.

As stated earlier, in *Doan*, the Court of Criminal Appeals noted the importance of classifying motions to adjudicate guilt as criminal rather than administrative proceedings. *Doan*, 369 S.W.3d at 210-212. A common

theme amongst the decisions holding that the Confrontation Clause does not apply in revocation proceedings is the determination that a proceeding to adjudicate guilt is not a stage of the "criminal prosecution" for purposes of the Sixth Amendment. See e.g. *Guillory*, 652 S.W.3d at 927; *Olabode*, 575 S.W.3d at 881-882; *Smart*, 153 S.W.3d at 120-121. Juxtaposed within this theme is the U.S. Supreme Court's statement in *Scarpelli* that "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

However, the Court of Criminal Appeals has stated that it does "not agree that *Scarpelli* is applicable to Texas probation revocation proceedings." *Ex parte Shivers*, 501 S.W.2d 898, 900-901 (Tex. Crim. App. 1973). See also *Doan*, 369 S.W.3d at 209-210 (noting differences between the administrative proceedings described by the U.S. Supreme Court in *Scarpelli* and the Texas judicial probation-revocation procedure). The Court noted "that when probation is granted the court shall have the power 'to suspend the imposition of sentence." *Shivers*, 501 S.W.2d at 901. "Thus, any subsequent revocation of probation comes before the imposition of sentence and before the end of the criminal prosecution." *Id*. "In Texas, the procedure

for revoking probation affords a probationer greater safeguards than those required by [*Scarpelli*] and *Morrissey*. *Tapia v. State*, 462 S.W.3d 29, 42 (Tex. Crim. App. 2015).

The U.S. Supreme Court has stated criminal proceedings generally unfold in three discrete phases:

> First, the State investigates to determine whether to arrest and charge a suspect. Once charged, the suspect stands accused but is presumed innocent until conviction upon trial or guilty plea. After conviction, the court imposes sentence.

Betterman v. Montana, 578 U.S. 437, 441 (2016)

In 2019, the U.S. Supreme Court has considered the scope of the term "criminal prosecution" in the context of federal supervised release. *United States v. Haymond*, 588 U.S. 634 (2019) (plurality op.). In *Haymond*, the plurality concluded, "[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed." *Id*. at 647.[5] Under this framework, a Texas adjudication hearing clearly falls under a criminal prosecution for

[5] The dissenting opinion of Justice Alito emphasized that the historical understanding of a "criminal prosecution" is that it continues through final judgment. He quoted numerous authorities, dating back to the mid-nineteenth century, for this proposition. See, e.g., The Universal English Dictionary 465 (J. Craig ed. 1869): "[T]he institution of legal proceedings against a person; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment" *Haymond*, 588 U.S. at 672 (Alito, J., dissenting).

purposes of the Sixth Amendment and Article 1, Section 10 of the Texas Constitution.

"Deferred adjudication is one of many options available to trial courts in criminal cases." *Taylor v. State*, 131 S.W.3d 497, 499 (Tex. Crim. App. 2004). "When applicable, the judge may 'defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.'" *Id*. "The judge 'may impose a fine applicable to the offense.'" *Id*. "If the defendant violates a condition of community supervision, the court may proceed to adjudicate guilt and assess punishment." *Id.* In addition, the Court of Criminal Appeals stated:

> We have noted that "the true objective" of deferred adjudication "is to divert the accused from the gauntlet run of the criminal justice system" and to allow the judge to "enter into a clearly understood pact with the accused that will induce and persuade him to follow the diversionary road." During that time, there is no finding of guilt and no final conviction. Instead, the judge makes a finding that the evidence "substantiates the defendant's guilt" and then defers the adjudication. The case is "temporarily stilled and the accused . . . [is] permitted an opportunity to demonstrate his capacity for prescribed good behavior during a specified period." If the defendant succeeds, the case, for most purposes, "disappears." If he fails, the case continues on as if it had never been interrupted.

Id. 499-500 (citations omitted)

Furthermore, the Court of Criminal Appeals has determined "that there is a Sixth Amendment right to counsel in adjudication hearings even though the express terms of the Sixth Amendment say that right applies only to criminal prosecutions." *Cunningham*, 673 S.W.3d at 291, citing *Parker v. State*, 545 S.W.2d 151, 155 (Tex. Crim. App. 1977). "In doing so, the CCA noted that it had previously determined that 'revocation proceedings cannot be isolated from the context of the criminal process' and referred to them as criminal prosecutions." *Id*.[6]

"[A]n order deferring adjudication of guilt and placing a defendant on probation or community supervision is not a conviction." *Hassan v. State*, 440 S.W.3d 684, 687 (Tex. App.—Houston [14th Dist.] 2012, no pet.), citing *Price v. State*, 866 S.W.2d 606, 611 (Tex. Crim. App. 1993). "In a deferred disposition, there is no judgment because there is no declaration of a conviction or acquittal." *State v. Cuarenta*, No. PD-0205-24, 2025 Tex. Crim. App. LEXIS 34 at *7 (Tex. Crim. App. Jan. 22, 2025) (designated for publication). "Without a judgment, there can be no sentence." *Id*.

[6] The Court of Criminal Appeals noted that "revocation proceedings cannot be isolated from the context of the criminal process" in *Crawford v. State*, 435 S.W.2d 148, 151 (Tex. Crim. App. 1968). The statement that revocation proceedings being referred to as "criminal prosecutions" under Article 1, Section 10 of the Texas Constitution comes from the Texas Supreme Court's decision in *Fariss v. Tipps*, 463 S.W.2d 176 (Tex. 1971).

"Community supervision is an arrangement in lieu of the sentence—it is not part of the sentence." *Hassan*, 440 S.W.3d at 687, citing *Speth v. State*, 6 S.W.3d 530, 532 (Tex. Crim. App. 1999). "Deferred adjudication is, therefore, not a form of punishment; punishment is assessed only after deferred adjudication probation is revoked." *Id*., citing *Walker v. State*, 557 S.W.2d 785, 786 (Tex. Crim. App. 1977). "An order of deferred disposition does not order that the punishment be carried into execution, nor does it revoke a suspension of the imposition of a sentence. Therefore, it is not a sentence." *Cuarenta*, 2025 Tex. Crim. App. LEXIS 34 *7. Finally, the Court of Criminal Appeals has noted that "there are few procedural differences between a Texas criminal trial and a Texas community-supervision revocation proceeding." *Doan*, 369 S.W.3d at 210.

In essence, a deferred adjudication order, unlike a probation order, does not impose a final judgment and sentence. *Taylor*, 131 S.W.3d at 500 ("there is no finding of guilt and no final conviction"). Under the Texas scheme, a deferred is a temporary pause in the ultimate criminal proceeding. It postpones a final adjudication of guilt, provided the defendant successfully completes a term of community supervision with such conditions as the trial court chooses to impose. If the defendant does

so, the court will dismiss the case and he will not have a final judgment on his record. See TEX. CODE CRIM. PROC. ART. 42A.111. However, should the defendant fail to live to up his end, the criminal proceedings would continue and conclude with a trial court potentially adjudicating guilt and assessing a potential punishment. See TEX. CODE CRIM. PROC. ARTS. 42A.108 and 42A.110. And in this proceeding, a defendant would be subjected to a proceeding that is nearly identical to that of his criminal trial. As a result, an adjudication proceeding is a criminal proceeding for purposes of the Confrontation Clause.

Because the adjudication hearing occurred during a "criminal prosecution" – i.e. before the entering of a final judgment and the imposition of sentence, the Sixth Amendment's and the Texas Constitution's guarantees of a defendant's right to confront and cross-examine witnesses governed the proceeding.[7]

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[7] "Texas Courts decline to apply the state Confrontation Clause guarantee in a broader manner than the federal Constitutional guarantee." *McWilliams v. State*, 367 S.W.3d 817, 820-821 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Again, the Court of Criminal Appeals has stated that it does "not agree that *Scarpelli* is applicable to Texas probation revocation proceedings." *Shivers*, 501 S.W.2d at 900-901. The Court in *Doan* noted that an adjudication proceeding is nearly identical to a criminal trial. *Doan*, 369 S.W.3d at 210. A deferred adjudication order does not impose a final judgment and sentence. Should this Court believe that the U.S. Supreme Court's statement in *Scarpelli* that probation revocation is not a stage of a criminal prosecution controls, then Appellant contends that in this instance, the definition of "criminal prosecution" under

2) The statements from officials in the State of Florida contained within the chronologicals were testimonial and their admittance violated the Confrontation Clauses under both the U.S. and Texas Constitutions

Here, the record reveals that Ms. Vitela testified that the reports from Florida indicated that Appellant was not compliant with the outpatient treatment program and did not complete it as of July 2024. (1 R.R. at 43-44). An entry dated September 13, 2022 indicated that Appellant reported that DAF was not helping him due to some medication he was taking and he switched to Florida Treatment Centers in June 2022 where he remained. Harris County (1 R.R. at 49-50; 2 R.R. State's Ex. 3). As detailed above, the reporting from Florida including within the chronologicals admitted by the State stated "Although the subject is enrolled in an Outpatient treatment program, he left Drug Abuse Foundation, without permission and did not successfully complete it." (2 R.R. State's Ex. 3 at p. 24). In addition, the chronologicals contained statements from Florida probation officers indicating:

> On 8/2/21, the offender's previous probation officer, submitted a progress report stating the offender testing positive for extended opiates and cocaine. He recommended a substance

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Article 1, Section 10 of the Texas Constitution is broader than its federal counterpart based upon the arguments made within this issue. And a result, Appellant would contend that the Confrontation Clause guarantee under the Texas Constitution should be applied in a broader manner that the federal constitutional guarantee.

> abuse evaluation and twice a month drug testing. The offender has successfully completed residential treatment and is enrolled in outpatient treatment, at a treatment center other than Drug Abuse Foundation, where he was instructed to attend. This individual did not discuss the matter or issues he was having with our office, he just quit going to DAF and enrolled in Central Florida Treatment Centers.

(2 R.R. State's Ex. 3 at p. 24)

Repeatedly, the chronologicals indicated that Appellant had not completed the required outpatient treatment. However, as Ms. Varela admitted, she had no personal knowledge over the events that allegedly occurred in Florida. (1 R.R. at 16). She had to rely on these reports from Florida in order to testify that Appellant was not complying with the treatment conditions of his probation. As such, the statements from the Florida probation officers describing the various ways that Appellant was allegedly violating the conditions of his deferred adjudication were testimonial given that the statements were made under circumstances which would lead an objective witness reasonably to believe that the statements from Florida would be available for use at a potential revocations hearing. See *Cunningham*, 673 S.W.3d at 292-293 and *Trigo*, 485 S.W.3d at 610 ("The Court of Criminal Appeals has summarized three kinds of testimonial statements: (1) ex parte in-court testimony or its functional equivalent, i.e.,

pretrial statements that declarants would expect to be used prosecutorially…and (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.").[8] As a result, the trial court committed error by admitting the chronologicals over Appellant's confrontation objections.

D. Harm

"A Confrontation Clause violation is constitutional error that requires reversal unless we conclude beyond a reasonable doubt that the error was harmless." *Lee*, 418 S.W.3d at 899. See also TEX. R. APP. P. 44.2(a). "The State has the burden, as beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020), citing *Deck v. Missouri*, 544 U.S. 622, 635 (2005) and *Wall*, 184 S.W.3d at 746 n. 53.

"In applying the 'harmless error' test, we ask whether there is a 'reasonable probability' that the error might have contributed to the

[8] The business records exception to the hearsay rule would not have made the statements from the Florida probation department admissible as those statements were testimonial. See *Infante v. State*, 404 S.W.3d 656, 665 (Tex. App.—Houston [1st Dist.] 2012, no pet.), quoting *Segundo v. State*, 270 S.W.3d 79, 106-107 (Tex. Crim. App. 2008).

conviction." *Love v. State*, 543 S.W.3d 835, 846 (Tex. Crim. App. 2006), citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g). The analysis "should not focus on the propriety of the trial's outcome; instead, we should calculate as much as possible the probable impact on the jury in the light of the existence of other evidence." *Id*., citing *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). "[T]he reviewing court must ask itself whether there is a reasonable probability that the *Crawford* error moved the jury from a state of non-persuasion to one of persuasion on a particular issue." *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). Relevant factors for a Confrontation violation include:

> (1) the importance of the out-of-court statement to the State's case; (2) whether the statement was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the statement on material points; and (4) the overall strength of the State's case.

Render v. State, 347 S.W.3d 905, 918-919 (Tex. App.—Eastland 2011, pet. ref'd) (citations omitted)

"[T]he entire record is to be evaluated in a neutral manner and not in the light most favorable to the prosecution." *Kapperman v. State*, No. 01-20-00127-CR, 2022 Tex. App. LEXIS 6739 at *78 (Tex. App.—Houston [1st Dist.] Sept. 1, 2022, no pet.) (mem. op., not designated for publication).

The State's main evidence to substantiate that Appellant violated his probation by failing to attend intensive outpatient program and/or supportive outpatient program and aftercare until successfully completed or designated by the Court was the chronologicals. On the other hand, Appellant testified that he attended outpatient treatment at DAF. (1 R.R. at 68). He believed he was there for a month or two, as once he arrived it was the same curriculum that he had learned during the inpatient treatment. (1 R.R. at 68). The main reason Appellant decided to go to a different treatment center was because DAF did not allowed medicated assisted treatment. (1 R.R. at 68). He discussed his issues with DAF with probation. (1 R.R. at 77). Appellant wanted to stay sober and went to Florida Treatment Center. (1 R.R. at 69). He attended daily from the time he left the DAF up until the date of his revocation of probation or the date that he got arrested. (1 R.R. at 70-71). Appellant notified his Florida probation officer that he was attending at the Florida Treatment Center and they did not tell him to stop going there and return to DAF. (1 R.R. at 71, 78-79). He was attending treatment until he was arrested and that was the reason he did not complete the treatment. (1 R.R. at 78). In contrast, the chronologicals indicated that Florida told Appellant to return to DAF. (2

R.R. State's Ex. 3). Without the chronlogicals, Appellant contends that the evidence would have been insufficient to find that Appellant violated his probation by not successfully completing outpatient treatment. In addition, the State emphasized the information from Florida contained in the chronologicals during their brief closing argument:

> In fact, on Page 11 of the probation file, the -- Florida, on September 13, 2020, in a progress report, they actually note that the offender maintained -- when he justified why he left the outpatient treatment he first started going to, it said the offender maintained that he completed all treatment while in Texas. However, Florida does not have any documentation of this.

(1 R.R. at 87)

The State will likely contend that Appellant's own admission to testing positive for cocaine was sufficient evidence in of itself to prove that Appellant violated a condition of his deferred adjudication, rendering any error harmless. (1 R.R. at 78) (Appellant remembered taking a drug test on May 31, 2024 and testing positive for cocaine. He then agreed that State's Exhibit 4 was his drug test). See *Davis v. State*, 591 S.W.3d 183, 189 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (Violation of a single condition of community supervision will support the trial court's decision to adjudicate guilt.).

However, the record appears to demonstrate that Appellant's community supervision did not include a condition requiring Appellant to not use, possess, or consume any illegal drug or prescription drug not currently prescribed to him by a medical professional after December 8, 2020. On April 30, 2020, Appellant's initial conditions of community supervision included a condition related to use/consumption of illegal drugs or prescriptions not prescribed:

> 2. Not use, possess, or consume any illegal drug or prescription drug not currently prescribed to you by a medical professional. You shall bring all current prescription containers to your Community Supervision Officer. If new medication is prescribed, you must bring the new prescription containers by your next scheduled report date.

(C.R. at 29)

These conditions were signed by the Appellant, the trial court, and the Court liaison officer on April 30, 2020. (C.R. at 32). However, the 2nd Amended Conditions of Community Supervision modified Appellant's community supervision and removed condition 2:

> It is therefore ordered, adjudged and decreed by the court that the previous supervision order(s) be modified, to wit:
>
> 2. Condition 2 has been removed for the following reason: DELETE DRUG TEST TRANSFER TO FLORIDA

(C.R. at 35)

These 2nd Amended conditions were signed by the Appellant and the trial court on December 8, 2020. (C.R. at 36). The docket sheet also indicates this order was entered on this date. (C.R. at 142). "An order revoking probation must be based on a condition of probation imposed by the court or on a condition as modified by the court." *DeGay v. State*, 741 S.W.2d 445, 449 (Tex. Crim. App. 1987), citing *Pequeno v. State*, 710 S.W.2d 709 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). "It is also well established that a trial court cannot delegate its duty to and responsibility for determining the conditions of probation to the probation officer or anyone else." *Id.* (citations omitted). Nothing from the docket sheet indicates that the trial court entered any order further amending Appellant's conditions to reinsert condition 2 as a condition of Appellant's community supervision. (C.R. at 141-144). As such, the State cannot rely on any alleged potential violation regarding Appellant failing a drug test, given that Appellant's 2nd Amended Conditions of Community Supervision removed condition 2 as a condition of Appellant's community supervision and nothing in the record indicates that the trial court restored this condition. As a result, the trial court's erroneous admission of State's Exhibit 3, the

chronologicals that contained statements from the Florida probation department, was not harmless beyond a reasonable doubt.

2. Whether the trial court reversibly erred when it admitted State's Exhibit 3 that contained statements from Appellant's probation officers in Florida in violation of Appellant's Due Process rights to confront and cross-examine witnesses?

A. Applicable Law

"The Due Process Clause…guarantees to the accused the right to confront witnesses." *State v. Nunez*, No. 01-23-00322-CR, 2024 Tex. App. LEXIS 4940 (Tex. App.—Houston [1st Dist.] July 16, 2024, pet. filed) (designated for publication), citing U.S. CONST. AMEND. VI. A probationer is entitled to certain due process protections in revocations proceedings. See *Bradley v. State*, 564 S.W.2d 727, 729 (Tex. Crim. App. 1978) and *Whisenant v. State*, 557 S.W.2d 102, 105 (Tex. Crim. App. 1977). "The central issue to be determined in reviewing a trial court's exercise of discretion in a community supervision is whether the defendant was afforded due process of a law." *Tapia*, 462 S.W.3d at 42. The U.S. Supreme Court has "enunciated the minimum requirements of due process which must be observed in community supervision revocation hearings: (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of the evidence against him; (3) opportunity to be heard

in person and to present witnesses and evidence, and the right to confront and cross-examine adverse witnesses; (4) a neutral and detached hearing body; and (5) a written statement by the fact finders as to the evidence relied on and the reasons for revoking probation." *Id.*, citing *Scarpelli*, 411 U.S. at 786 and *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). The United States Supreme Court has stated:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Pointer v. Texas, 380 U.S. 400, 405 (1965)

B. Standard of Review

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Pittman*, 321 S.W.3d at 572-573. "The test for whether the trial court abused its discretion is whether the action was arbitrary or unreasonable." *Mechler*, 153 S.W.3d at 439. "An appellate court should not reverse a trial judge whose ruling is within the zone of reasonable disagreement." *Id*.

C. Analysis

As noted within his first issue, the State sought to admit Appellant's chronologicals. (1 R.R. at 13). One of Appellant's objections was a Confrontation Clause objection based upon Due Process. (1 R.R. at 27) ("The next objection is going to be that State's Exhibit 3 violates my client's confrontation clause rights under the Texas and United States Constitutions. There are many testimonial statements from his probation officer -- from his alleged probation officer in Florida, and they're being used here in court against him. He has the right to confront that witness before her testimonial statements are admitted against him."); (1 R.R. at 30) ("The defense's argument would be that this is clearly a criminal proceeding to send my client to possibly up to life in prison. He should have the rights afforded to him by the Constitution including the right not to testify, the right to due process, and the right to confront the witnesses against him."). Given trial counsel's invocation of Due Process while discussing his ability to confront the witnesses against him, Appellant has adequately preserved error. See *Cunningham*, 673 S.W.3d at 291-292. See also *Bennett v. State*, 235 S.W.3d 241 (Tex. Crim. App. 2007) ("Magic words are not required; a complaint

will be preserved if the substance of the complaint is conveyed to the trial judge.").

As noted previously, the chronologicals documented numerous instances where Appellant allegedly violated the terms of his supervision. (2 R.R. State's Ex. 3). See *Supra* at pp. 14-17. The reports from Florida indicated that Appellant was not compliant with the outpatient treatment program and did not complete it as of July 2024. (1 R.R. at 43-44). An entry dated September 13, 2022 indicated that Appellant reported that DAF was not helping him due to some medication he was taking and he switched to Florida Treatment Centers in June 2022 where he remained. (1 R.R. at 49-50; 2 R.R. State's Ex. 3). The chornologicals also indicated that "although the subject is enrolled in an outpatient program, he left Drug Abuse Foundation without permission and did not successfully complete it." (1 R.R. at 51). The only witness called by the State at the revocation hearing was Esperanza Vitel, a probation officer for Harris County who had no personal knowledge over the events that allegedly occurred in Florida. (1 R.R. at 12, 16, 48). She had to rely on these reports from Florida in order to testify that Appellant was not complying with the treatment conditions of his probation. (1 R.R. at 43-44; 2 R.R. State's Ex. 3). To Ms. Vitel's

knowledge, the State of Florida reported to them in the last violation reported indicating that Appellant did not complete outpatient treatment. (1 R.R. at 53).

Notably, no one from Florida testified regarding Appellant's alleged violations that occurred in Florida. No information is contained in the appellate record that demonstrates why a person from Florida could not testify in person at the adjudication hearing. Appellant has a Due Process right "to confront and cross-examine adverse witnesses" during his adjudication hearing. *Tapia*, 462 S.W.3d at 42. The probation officers from Florida who reported Appellant's alleged violations were the key witnesses against him and Appellant had no opportunity to confront and cross-examine them. As a result, Appellant's Due Process right to confrontation were violated and the trial court erred by admitting State's Exhibit 3, the chronologicals, over his objections.

D. Harm

The harm analysis is governed by Texas Rules of Appellate Procedure 44.2(a). See *Cunningham*, 673 S.W.3d at 293. "If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or

punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a). The entire record is reviewed and the following factors are considered:

> (1) the importance of the [complained-of] evidence to the State's case; (2) whether the . . . evidence was cumulative of other evidence; (3) the presence or absence of other evidence corroborating or contradicting the [complained-of] evidence, . . . ; (4) the overall strength of the State's case"; and (5) any other factor in the record that affects the probable impact of the error.

Cunningham, 673 S.W.3d at 293, quoting *Crayton v. State*, 485 S.W.3d 488, 485 (Tex. App.—Texarkana 2016, no pet.) (alterations in original)

"The State has the burden, as beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard*, 612 S.W.3d at 328.

For the sake of brevity, Appellant incorporates in full his argument regarding harm as written within his first issue. For the reasons contended within his first issue, Appellant suffered constitutional harm.

3. Whether the trial court reversibly erred when it admitted State's Exhibit 3 that contained statements from Appellant's probation officers in Florida over Appellant's hearsay objections?

A. Applicable Law

"The Hearsay doctrine, codified in Rules 801 and 802 of the Texas Rules of Evidence, is designed to exclude out-of-court statements offered for the truth of the matter asserted that pose any of the four 'hearsay dangers' of faulty perception, faulty memory, accidental miscommunication, or insincerity." *Fischer v. State*, 252 S.W.3d 375, 378 (Tex. Crim. App. 2008). "The numerous exceptions to the hearsay rule set out in Rules 803 and 804 are based upon the rationale that some hearsay statements contain such strong independent, circumstantial guarantee of trustworthiness that the risk of the four hearsay dangers is minimal while the probative value of such evidence is high." *Id*. One of those exemptions is present sense impression. See TEX. R. EVID. 803(1).

"A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it" is a present sense impression. TEX. R. EVID. 803(1). "The rationale for this exception is that the contemporaneity of the statement with the event that it describes eliminates

all danger of faulty memory and virtually all danger of insincerity." *Fischer*, 252 S.W.3d at 380. In *Fischer*, the Court of Criminal Appeals stated:

> The rule is predicated on the notion that the utterance is a reflex product of immediate sensual impression, unaided by retrospective mental processes. It is instinctive, rather than deliberate. If the declarant has had time reflect upon the event and the conditions he observed, this lack of contemporaneity diminishes the reliability of the statements and renders them inadmissible under the rule.
>
> Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious thinking-it-through statements enter the picture, the present sense impression exception no longer allows their admission. Thinking about it destroys the unreflective nature required of a present sense impression.

Id. (internal quotations omitted).

"To admit hearsay evidence as a present sense impression, three principal requirements must be met: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration: and (3) the declaration must be contemporaneous with the event." *Valmana v. State*, 605 S.W.3d 490, 507 (Tex. App.—El Paso 2020, pet. ref'd).

B. Standard of Review

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Pittman*, 321 S.W.3d at 572-573. "The test for whether the trial

court abused its discretion is whether the action was arbitrary or unreasonable." *Mechler*, 153 S.W.3d at 439. "An appellate court should not reverse a trial judge whose ruling is within the zone of reasonable disagreement." *Id*.

C. Analysis

During the adjudication hearing, Appellant objected to the chronologicals, as the statements from Florida were hearsay, specifically hearsay within hearsay. (1 R.R. at 17-27). After hearing from the parties, the trial court overruled Appellant's objections, finding that State's Exhibit 3 satisfied Rules 803(1) and 803(6)(E). Appellant takes issues with the trial court's ruling concerning Rule 803(1).

Even though the business record exception would apply to the chronological record itself, the individual statements/entries from the Florida probation department would still have to satisfy an exception to the hearsay rule. See TEX. R. EVID. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."). Here, the statements from the chornologicals by the Florida probation department were not an off-hand, non-reflective observations, but were fraught with the thought of having

Appellant's probation revoked. See *Eggert v. State*, 395 S.W.3d 240, 242-243 (Tex. App.—San Antonio 2012, no pet.) ("The recorded factual observations made by Officer Navarijo while investigating appellant were not the non-reflective observations of a neutral observer that the present sense impression exception is designed to allow. Instead, Officer Navarijo's comments were more analogous to a police report in that they were 'on-the-scene observations and narrations of a police officer conducting a roadside investigation' made with the thought of future prosecution in mind."), citing *Fischer*, 252 S.W.3d at 384. A review of the chronologicals demonstrates this. For example, one of the entries by Florida presented in narrative form a laundry list of Appellant's activity:

> "On 03/28/22, the offender was enrolled in Outpatient Drug Treatment, at Drug Abuse Foundation, which he did not complete. He reported that DAF was not helping him, due to some medication he was taking. He switched to Florida Treatment Centers in 2022 and has remained there in Outpatient Treatment. This individual enrolled in Maintenance Assistant Treatment (MAT), where he takes 120mg of methadone daily, and his counselor, Seeta Bhaggan reported via a progress report and a telephone conversation with her on 07/27/22, when she reported that the offender attends daily and actively participates in treatment. Although the subject is enrolled in an Outpatient treatment program, he left Drug Abuse Foundation, without permission and did not successfully complete it. Note: The offender maintained that he completed all treatment while in Texas; however Florida does not have any documentation of this.

> On 8/2/21, the offender's previous probation officer, submitted a progress report stating the offender testing positive for extended opiates and cocaine. He recommended a substance abuse evaluation and twice a month drug testing. The offender has successfully completed residential treatment and is enrolled in outpatient treatment, at a treatment center other than Drug Abuse Foundation, where he was instructed to attend. This individual did not discuss the matter or issues he was having with our office, he just quit going to DAF and enrolled in Central Florida Treatment Centers. As a result of his treatment decisions, his mother has contacted our office to complain that her son has recently overdosed and she has suspected him using for some months now. The offender has been tested multiple times at his probation office and his results have been negative, excluding marijuana, for which he has a medical marijuana card that expires today, 8/9/22. His mother reported to the officer's supervision that her son has also attempted suicide, in the past, along with his drug usage. At this point, this officer would recommend if the State of Texas is not inclined to remand the offender, that he be required to undergo a substance abuse and mental health evaluation and successfully complete any recommended treatment, continue twice per month drug testing and enter and successfully complete a residential substance abuse treatment program and any aftercare that is recommended. The offender is not allowed to leave the treatment facility without the consent of Florida Probation or the State of Texas. All other conditions are to remain the same.

(2 R.R. State's Ex. 3, p. 17, 24)

The other cited entries from the chronologicals within this brief are similarly written. See *Supra* at pp. 14-17. These entries are not instinctive, they are deliberate. See *Fischer*, 252 S.W.3d at 381. As a result, the entries in the chronologicals from the Florida probation department were a

narration of events, instead of an explanation or description of the events. Based on the foregoing, the trial court erred by admitting State's Exhibit 3 over Appellant's hearsay objections.

D. Harm

Improper admission of evidence is reviewed under TEX. R. APP. P. 44.2(b). "[A]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the verdict." *Nguyen v. State*, 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). "The focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict." *Hankston v. State*, 656 S.W.3d 914, 919 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd), citing *Barshaw v. State*, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011). "A conviction must be reversed if this court has 'grave doubt' that the result of the trial was free from the substantial effect of the error." *Id*. "'Grave doubt' means that 'in the judge's mind, the matter is so evenly balanced he feels himself in virtual equipoise as to the

harmlessness of the error." *Id*., quoting *Barshaw*, 342 S.W.3d at 94. When performing a harm analysis, an appellate court should consider the entire record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2001). This includes "the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence, the parties' theories of the case, arguments, voir dire, and whether the State emphasized the error." *Hankston*, 656 S.W.3d at 919, citing *Thomas v. State*, 505 S.W.3d 916, 927 (Tex. Crim. App. 2016) and *Barshaw*, 342 S.W.3d at 94. Neither party has the burden of proof under Rule 44.2(b). *Webb v. State*, 36 S.W.3d 164, 182 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (en banc).

For the sake of brevity, Appellant incorporates in full his argument regarding harm as stated in his first issue. For the reasons contended within his first issue, Appellant was harmed by the admission of the chronologicals over his hearsay objection.

4. Whether the trial court abused its discretion when it revoked Appellant's community supervision?

A. Applicable Law

As a threshold matter, a determination to proceed with an adjudication of guilt is reviewable on appeal in the same manner as a revocation hearing in a regular probation hearing. Appellate review of an order revoking probation is limited to abuse of discretion. *Rickles v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). In determining questions regarding sufficiency of the evidence, the burden of proof is by a preponderance of the evidence, that is, the greater weight of credible evidence that would create a reasonable belief that the defendant has violated a condition of his probation. *Id*. at 764. The appellate court reviews the evidence in the light most favorable to the trial court's decision. *Liggett v. State*, 998 S.W.2d 733, 736 (Tex. App.—Beaumont 1999, no pet.). Violation of a single condition of community supervision will support the trial court's decision to adjudicate guilt. *Davis*, 591 S.W.3d at 189.

"The factfinder is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and [an appellate court] may not substitute [its] judgment as to facts for that of the factfinder as shown through its findings. *Carreon v. State*, 548 S.W.3d 71, 77 (Tex. App.—

Corpus Christi - Edinburg 2018, no pet.), citing *Montgomery v, State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). "When [an appellate court is] faced with a record supporting contradicting inferences, [it] must presume that the facts finder resolved any such conflict in factor of its findings, even if it is not explicitly stated in the record." *Id*. "The test for abuse of discretion is not whether, in the opinion of the appellate court, the facts present a suitable case for the trial court's action, but rather, whether the trial court acted without reference to any guiding rules of principles." *Id*. "A trial court abuses its discretion if the decision is so clearly wrong as to lie outside the zone within which reasonable persons might disagree." *Armstrong v. State*, 82 S.W.3d 444, 448 (Tex. App.—Austin 2002, pet. ref'd), citing *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992) (en banc). In *Leonard*, the Court of Criminal Appeals articulated the standard of review regarding a condition of a defendant's community supervision when the Appellant's compliance with that condition is subjected to the discretion of a third-party:

> In such a case, to determine whether the trial court abused its discretion we must also examine the third party's use of its discretion to ensure that it was used on a basis that was rational and connected to the purposes of community supervision.

Leonard v. State, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012)

"Because the trial court is the trier of fact [in revocation proceedings], appellate courts indulge in the presumption that the trial judge disregarded any inadmissible evidence, including hearsay. If there remains sufficient admissible evidence to support revocation of community supervision, the trial court's action is affirmed. If there is insufficient evidence to support the finding when the hearsay is excluded from consideration, the revocation order is reversed and the case remanded for further revocation proceedings." George E. Dix and John M. Schmolesky, 43A TEX. PRAC. SERIES, Criminal Practice and Procedure § 48.53 (Apr. 2019 update), citing *Johnson v. State*, 498 S.W.2d 198, 200 (Tex. Crim. App. 1973).

B. Analysis

The evidence was insufficient to support a finding that Appellant failed to attend intensive outpatient program and/or supportive outpatient program and aftercare until successfully completed or as designated by the Court.

When the inadmissible hearsay evidence from the chonologicals is disregarded, the only evidence regarding the outpatient treatment condition came from the Appellant himself. Appellant testified that he initially attended outpatient treatment at DAF. (1 R.R. at 68). He believed he was

there for a month or two, as once he arrived it was the same curriculum that he had learned during the inpatient treatment. (1 R.R. at 68). The main reason Appellant decided to go to a different treatment center was because DAF did not allowed medicated assisted treatment. (1 R.R. at 68). He discussed his issues with DAF with probation. (1 R.R. at 77). Appellant wanted to stay sober and went to Florida Treatment Center. (1 R.R. at 69). He attended daily from the time he left the DAF up until the date of his revocation of probation or the date that he got arrested. (1 R.R. at 70-71). Appellant notified his Florida probation officer that he was attending at the Florida Treatment Center and they did not tell him to stop going there and return to DAF. (1 R.R. at 71, 78-79). He was attending treatment until he was arrested and that was the reason he did not complete the treatment. (1 R.R. at 78). In essence, the only reason Appellant had not yet completed the outpatient treatment program he was attending was due to his arrest for his alleged probation violations. To say that Appellant violated a condition of his community supervision by failing to successfully complete an outpatient treatment program when the only reason he did not was because he was arrested for alleged probation violations would offend due process as this would be a wholly inappropriate reason for the trial court to conclude he

violated this condition. See *Torres*, 617 S.W.3d at 104-105 (“‘And we conclude that it "would surely offend due process’ if Torres ‘were discharged from his therapy program for a wholly inappropriate reason—such as illegal discrimination or mere caprice—and the bare fact of that discharge were used as a basis to revoke the defendant's community supervision.’”).

The trial court also orally found that Appellant violated his community supervision by testing positive for cocaine. (1 R.R. at 86). However, the record appears to demonstrate that Appellant’s community supervision did not include a condition requiring Appellant to not use, possess, or consume any illegal drug or prescription drug not currently prescribed to him by a medical professional as of December 8, 2020. On April 30, 2020, Appellant’s initial conditions of community supervision included a condition related to use/consumption of illegal drugs or prescriptions not prescribed:

> 2. Not use, possess, or consume any illegal drug or prescription drug not currently prescribed to you by a medical professional. You shall bring all current prescription containers to your Community Supervision Officer. If new medication is prescribed, you must bring the new prescription containers by your next scheduled report date.

(C.R. at 29)

These conditions were signed by the Appellant, the trial court, and the Court liaison officer on April 30, 2020. (C.R. at 32). However, the 2nd Amended Conditions of Community Supervision modified Appellant's community supervision and removed condition 2:

> It is therefore ordered, adjudged and decreed by the court that the previous supervision order(s) be modified, to wit:
>
> 2. Condition 2 has been removed for the following reason: DELETE DRUG TEST TRANSFER TO FLORIDA

(C.R. at 35)

These 2nd Amended conditions were signed by the Appellant and the trial court on December 8, 2020. (C.R. at 36). The docket sheet also indicates this order was entered on that same date. (C.R. at 142). "An order revoking probation must be based on a condition of probation imposed by the court or on a condition as modified by the court." *DeGay*, 741 S.W.2d at 449. "It is also well established that a trial court cannot delegate its duty to and responsibility for determining the conditions of probation to the probation officer or anyone else." *Id*. Nothing from the docket sheet indicates that the trial court entered any order further amending Appellant's conditions to reinsert condition 2 as a condition of Appellant's community supervision. (C.R. at 141-144). As such, the State cannot rely on any alleged

potential violation regarding Appellant failing a drug test, given that Appellant's 2nd Amended Conditions of Community Supervision removed condition 2 as a condition of Appellant's community supervision and nothing in the record indicates that the trial court restored this condition after December 8, 2020. As the evidence is insufficient to support the trial court's finding regarding the outpatient treatment and condition 2 was not a condition of Appellant's community supervision after December 8, 2020, the evidence was insufficient to support the trial court's revocation of Appellant's deferred adjudication community supervision.

5. Whether the trial court's judgment should be modified to reflect the actual conditions of community supervision that the trial court found to be true?

"An appellate court has the power to correct a trial court judgment 'to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require.'" *Morris v. State*, 496 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), quoting *Nolan v. State*, 39 S.W.3d 697 (Tex. App.—Houston [1st Dist.] 2001, no pet.). "Appellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the

judgment appears in the record." *Id*., citing *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd).

When a discrepancy exists between the trial court's oral pronouncement and its written order regarding the grounds supporting revocation of community supervision, the written order controls." *Brimzy v. State*, No. 14-22-00631-CR, 2024 Tex. App. LEXIS 2168 at *3 (Tex. App.—Houston [14th Dist.] Mar. 28, 2024, no pet. h.) (designated for publication), citing *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998) and *Simon v. State*, No. 14-18-00978-CR, 2020 Tex. App. LEXIS 2622 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020, no pet.) (mem. op., not designated for publication).

However, in *Mazloum,* the Court of Criminal Appeals modified a trial court's judgment to reflect a specific oral pronouncement of what terms were violated when the written judgment contained a finding that could not form the basis of a revocation. *Mazloum v. State*, 772 S.W.2d 131, 132 (Tex. Crim. App. 1989) (per curiam). In *Mazloum,* "the trial court 'specifically' found that appellant had violated the terms and conditions of probation by traveling outside Harris County without prior permission; and by unlawfully possessing marihuana." *Id*. "The written judgment revoking appellant's

probation recites only the violation pertaining to the possession of marihuana." *Id*. However, the defendant's probation could not "be revoked on the violation of possession of marihuana because the offense occurred after appellant's probationary term had expired." *Id*. As a result, the Court of Criminal Appeals "reform[ed] the judgment to reflect that appellant violated the terms and conditions of his probation by traveling outside Harris County without prior permission when, on August 3, 1987, appellant traveled to Boston, Massachusetts." *Id*.

The trial court's written judgment indicates that "[w]hile on community supervision, Defendant violated the conditions of community supervision, as set out it in the State's **AMENDED** Motion to Adjudicate Guilt, as follows: DID THEN AND THERE UNLAWFULLY COMMITT THE CRIMINAL OFFENSE OF AGG ASSAULTW/WEAPON. (C.R. at 131-132). However, prior to the beginning of the adjudication hearing, the State expressly abandoned their allegation regarding a new law violation. (1 R.R. at 7). In addition, at the conclusion of the adjudication portion of the hearing, the trial court orally found the following violations "true": Condition number 2 by a preponderance of the evidence through cross-examination of the defendant, and condition number 19, attend intensive

outpatient program and/or supportive outpatient program and aftercare until successfully completed or designated by the Court. (1 R.R. at 88).

Given that the written judgment contains a finding of a violation that was not legally possible and the trial court made specific oral findings regarding which violations she determined to be "true," Appellant believes that this falls under *Mazloum*. As a result, Appellant requests that in the event this Court overrules his merits issues, this Court modify the trial court's judgment to remove the written finding that Appellant committed a new law offense and reform the judgment to include the correct violation that the trial court found to be true: that Appellant failed to successfully complete an outpatient treatment program.[9]

[9] For the reasons stated above, Appellant does not believe that the trial court could base a revocation on Appellant's failed drug test given that the 2nd Amended Conditions of Community Supervision removed Condition 2. However, should this Court disagree with this contention from Appellant, then the trial court's judgment should also be modified to include this oral finding.

PRAYER

Appellant, Carlos Murillo, prays that this Court reverse the trial court's adjudication of guilt and remand this case so that he can continue his deferred adjudication term. Alternatively, Appellant prays that this Court reverse the trial court's adjudication of guilt and remand this case for a new adjudication hearing. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served on Jessica Caird of the Harris County District Attorney's Office on February 10, 2025 to the email address on file with the Texas E-filing system.

/s/ Nicholas Mensch
Nicholas Mensch
Assistant Public Defender

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