NO. 14-24-00107-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH JUDICIAL DISTRICT
AT HOUSTON

ENRIQUE PALAFOX,
Appellant

v.

THE STATE OF TEXAS,
Appellee

APPELLANT'S BRIEF

On appeal from Cause Number 1741629
In the 182nd District Court
Harris County, Texas
Honorable Danilo Lacayo, Presiding

ATTORNEY FOR APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, Enrique Palafox, requests oral argument because he believes that it could aid the Honorable Court in its decision-making process.

IDENTIFICATION OF THE PARTIES

Pursuant to Tex. R. App. P. 38.2(a)(1)(A), a complete list of interested parties is provided below.

1. Appellant

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4. Trial Judge

Hon. Danilo Lacayo – 182nd District Court, Harris County, Texas
Hon. Denise Collins – Emergency Response Docket

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STATEMENT OF THE CASE

The state charged appellant, Enrique Palafox, with the offense of continuous sexual abuse of a child. CR 1: 35. Appellant's case proceeded to a jury trial in the 182nd District Court. On February 8, 2024, the jury found appellant guilty. CR 1: 192. Appellant submitted the issue of punishment to Judge Denise Collins who assessed a punishment of twenty-five years confinement in the Texas Department of Criminal Justice – Institutional Division and a $100.00 fine. CR 1: 195. The trial court certified Appellant's right to appeal. CR 1: 201. Appellant timely filed his Notice of Appeal. CR 1: 204. Appellant timely filed and presented a motion for new trial. CR 1: 216-58; CR 1: 259. The trial court denied Appellant's request for an evidentiary hearing on his motion for new trial on April 1, 2024. CR 1: 289. The trial court denied appellant's motion for new trial on April 12, 2024. SRR 1: 9.[1] This appeal follows.

[1] The record containing the trial court's ruling on the motion for new trial and trial court's findings are in a supplemental reporter's record entitled "Judge's Ruling on Motion for New Trial," which will be referred to as "SRR" in Appellant's brief. The trial record is referred to as Reporter's Record or "RR" and the Clerk's Record is cited as "CR."

ISSUES PRESENTED

I. The trial court violated the Appellant's 6th Amendment right to a public trial when it closed the courtroom and asked Appellant's family members to leave the courtroom prior to the beginning of jury selection.

II. The right to a public trial should be considered a category two right under *Marin v. State*.

III. Appellant's trial attorney rendered ineffective assistance when he failed to object to the trial court's closure of the courtroom in violation of the appellant's 6th Amendment right to a public trial.

IV. The trial court violated the appellant's 6th Amendment right to confront witnesses when it denied appellant the right to cross-examine a state's witness about her desire to obtain a "U-Visa" to allow her to legally remain in the United States.

V. The trial court abused its discretion when it denied appellant's request for an evidentiary hearing on his motion for new trial.

VI. The trial court abused its discretion when it denied appellant's motion for new trial.

SUMMARY OF THE FACTS

Appellant, Enrique Palafox, met K.E. when they were children in Tinguindin, a small town in Michoacan, Mexico. In time, appellant and K.E. separately arrived in the United States. Appellant became a naturalized United States citizen. K.E. came to the U.S. illegally and remained undocumented. RR 3: 142. K.E. had a daughter, K.B., with her first husband while she lived in Kansas. Eventually, K.E. and appellant were reunited via Facebook and then began an in-person relationship. They got married and had two more children. RR 3:141. After they married, appellant and K.E. discussed ways of changing K.E.'s immigration status. They consulted a lawyer in Kansas but could not financially afford to pursue a family-based immigration petition at that time. CR 1: 226.

In 2020, Appellant, K.E., K.B. (the complainant) and K.B.'s two younger siblings were living in Baytown, Texas. When the family moved to Baytown, appellant hired an immigration attorney, Luis Ruiz, to petition for legal permanent residence for K.E. CR 1: 226; RR 3: 142. Ruiz began work on a family-based immigration petition. Appellant worked at a refinery until the COVID-19 pandemic caused layoffs where appellant worked. RR 3:143. Faced with dim employment prospects, appellant, K.E., and the three children (all U.S. citizens by birth) went back to Tinguindin, Mexico so that appellant could work on his father's avocado farms. RR 3: 143. Before the family left for Mexico, they consulted with Mr. Ruiz

who informed them that K.E. may be subject to a ten-year bar to re-entry if she were to leave the United States. RR 3: 157-58. Mr. Ruiz planned to seek a waiver of the ten-year bar, but could not guarantee that the waiver would be granted. RR 3:158

While the family lived in Baytown, K.E. made a friend, Diana Narvaez. Ms. Narvaez was, like K.E., an undocumented immigrant married to a U.S. citizen. RR 4: 123. At trial, Ms. Narvaez testified outside the presence of the jury that in 2019, prior to when appellant's family moved to Mexico, and prior to the allegations against appellant, K.E. and Ms. Narvaez had a conversation about visas. RR 4: 124-126. Ms. Narvaez testified that she told K.E. that she was having problems with her husband and that she was concerned about being able to stay in the U.S. RR 4: 125. Ms. Narvaez then testified that K.E. explained to her that if she (Ms. Navaez) were a victim of domestic violence that she could get a "special visa" to stay in the U.S. RR 4: 125-27. Ms. Narvaez clarified that K.E. explained that this was a visa under the Violence Against Women Act. RR 4: 127.

After Ms. Narvaez's testimony, the trial court ruled that Ms. Narvaez could testify before the jury that she and K.E. discussed various pathways to citizenship, but could not specifically testify about the types of visas of how a visa might be obtained. RR 4: 136. During her testimony before the jury, Ms. Narvaez testified that K.E. had explained to her that she could "collect a visa to come to [the U.S.]

based on violence within the family." RR 4: 155. Ms. Navaez was not allowed to explain the conversation in any further detail.

In Tinguindin, K.E. expressed her desire to return the U.S. K.E. told her sister-in-law, Anna Hernandez, that she did not like living in Tinguindin, a very small city in a rural part of Michoacan, Mexico. CR 1: 232. She spoke of her plans to return to the U.S. as soon as possible. CR 1: 232.

In late April, 2021, appellant received word that he could be rehired at the refinery and decided to go back to Baytown to work. The family prepared for the appellant and his brother to back to Baytown and planned a family going away party. RR 4: On April 30, 2021, the day of the party, K.E. spoke to her immigration attorney, and learned that she would be denied legal re-entry to the United States for the next ten years. RR 4: 177. Multiple witnesses testified that K.E. became "hysterical." RR 4: 177. She began crying and screaming loud enough for family members downstairs to hear her. K.E. told appellant that she would not stay in Mexico, that she would pay a coyote to bring her back to the U.S. or fraudulently use her sister's visa to return. CR 1: 227; CR 1: 232. K.E. spoke to her sister-in-law, Ana Hernandez, and explained why she was so upset. CR 1: 233. Ms. Hernandez testified that she thought that K.E. sounded "desperate." RR 4: 197. Between May 8, 2021 and May 12, 2021, K.E. asked Ms. Hernandez to take K.B. to the U.S. Ms. Hernandez refused. CR 1: 233.

On May 15 or 16, 2021, after appellant moved back to Texas, K.B. allegedly told K.E. that appellant had been sexually abusing her for the last two years. By June 28, 2021, K.B. had arrived in the United States with her maternal aunt and submitted to forensic interview and a sexual assault examination. CR 1: 7. The examination revealed no physical evidence indicative of sexual assault or trauma. EX – 8. In her forensic interview, however, K.B. alleged that the appellant penetrated her vagina with his fingers, penetrated her mouth with his sexual organ, contacted her sexual organ with his mouth, and caused her hands to contact his sexual organ. CR 1: 7. Appellant was indicted with the offense of continuous sexual abuse of a child alleging predicate offenses of aggravated sexual assault and indecency with a child. CR 1: 35.

Prior to trial, the state designated K.E. as its "outcry witness" for purposes of admitting hearsay testimony. CR 1: 75. Before testimony began, the state made an oral motion in limine regarding K.E.'s application for a U-visa to enter and remain in the U.S. The trial court granted the state's motion in limine and required the parties to approach before eliciting testimony regarding K.E.'s attempt to obtain a U-visa. RR 3: 5.

In a hearing outside the presence of the jury, K.E. testified that when she and appellant lived in Baytown, appellant had hired an immigration attorney, Luis Ruiz, to complete a family-based immigration petition for K.E. RR 3: 142. She admitted

that Mr. Ruiz had informed her that she was subject to a ten-year bar to re-entry before appellant returned to Texas from Mexico. RR 3: 143-44.

Still outside the presence of the jury, K.E. testified that three days after K.B. made the allegations, K.E. spoke with her immigration attorney. K.E. testified that Ruiz called her to collect a payment and that she then told Ruiz about the alleged abuse. RR 3: 150. K.E. then testified that Ruiz informed her that they would no longer pursue the family-based immigration petition because "they were not a family anymore." RR 3: 151. He recommended that she contact the police in Baytown, Texas and referred her to CPS and Catholic Charities. RR 3: 151. K.E. claimed that the first time that she heard about "U-visas" was eight days after the outcry from the lawyer recommended by Mr. Ruiz and Catholic Charities worker. RR 3: 153. K.E. also claimed that she did not want to return the U.S. and that she planned to return to Michoacan when the case was over. RR 3: 153. She also testified that she no longer planned to seek U.S. residency or citizenship. RR 3: 154.

The trial court ruled that appellant could not question K.E. about her attempts to obtain a visa. The jury heard no evidence about the purpose of a "U-visa" or how one might be obtained. Nor did they hear any evidence that K.E. had sought information from Ruiz and Detective Hernandez about how to gain legal entry into the U.S. The trial court ruled that the evidence was irrelevant. RR 3: 165.

On May 20, 2021, K. E. spoke with a Baytown Police Department detective, Ivaleth Hernandez. Mr. Ruiz reported the allegations to the Baytown Police Department on May 18 or 19, 2021. Again, outside the presence of the jury, Detective Ivaleth Hernandez testified that she had been assigned to the case by her supervisor after "an attorney" contacted the Baytown Police Department to notify them that K.E. wished to make a report of sexual abuse. K.E. spoke with Hernandez the next day for "about twenty minutes." RR 3: 76. During the phone call, K.E. asked Hernandez for her help to get back to the United States. RR 3: 76. Hernandez directed K.E. to contact an attorney. RR 3: 75. Hernandez had several other phone calls with K.E. and conducted an interview with K.E. by Zoom. RR 3: 77. Hernandez then testified that she spoke a Child Protective Services worker named "Francesca." The two of them spoke about "seeing what they could do to help get [K.E.] to Texas," meaning how they could help K.E. obtain a visa. RR 3: 79-80. The complaint filed in this case shows that Detective Hernandez interviewed K.E. in person on August 2, 2021. CR 1: 7. The trial court denied appellant's request to present any of this testimony to the jury. RR 3: 83.

Appellant's trial took place in a courtroom in the Family Law Center. On the day that Appellant's trial began, appellant's sister, Hilda Palafox, and his brother-in-law, Jorge Pulido, came to the court to observe the trial and provide emotional support to appellant. CR 1: 230. Hilda had come with appellant to every court

appearance and intended to be present for her brother during the entire trial. CR 1: 230. Hilda and Jorge were sitting in the gallery of the courtroom while the jury panel waited in the hallway. CR 1: 230. Before jury selection began, the court's bailiff, in the presence of the trial judge, approached appellant's family members and asked them to leave the courtroom. CR 1: 230. When they hesitated to leave, the trial court informed them while "it was not illegal for [them] to stay, there [was] not enough room" for them in the courtroom. CR 1: 230; SRR 1:6. Hilda and Jorge left the courtroom and sat in the hallway during jury selection. CR 1: 231. They returned to the courtroom after the jury had been empaneled to watch the remainder of the trial.

After appellant filed a motion for new trial, the trial court made oral findings of fact about the closure of the trial and read them into the record. SRR 1: 6-7. From that record, it appears that the trial court found the following:

1. The facilities for trial in the Family Law Center are less spacious than overall trial courts in the Criminal Justice Center. SRR 1: 6.

2. 65 potential jurors were ordered for appellant's trial. SRR 1: 6.

3. 65 potential jurors appeared for the trial. SRR 1: 6.

4. The audience in the Family Law Center fits only 65 people. SRR 1: 6.

5. The bailiffs ordered visitors to leave. SRR 1: 6.

6. The two people who were ordered to leave were Hilda Palafox and Jorge Pulido. SRR 1: 7.

7. The trial court commented to folks who appeared to be with the defendant that it certainly is not illegal for them to remain, but there was no room. SRR 1: 6.

8. The only other possible alternative place for the two family members would have been the jury box. SRR 1: 6-7.

9. There may have been other places that could have accommodated the family members. SRR 1: 6.

10. The courtroom is very small. SRR 1: 6.

11. The jury box is just feet from the potential jurors. SRR 1: 7.

12. There were no other reasonable alternatives apparent. SRR 1: 7.

13. Defense counsel did not object to the removal of appellant's family members. SRR 1: 6.

14. Defense counsel did not request that the appellant's family members be placed in the jury box. SRR 1: 6.

15. If defense counsel's representation fell below the objective standard of reasonableness, there was not a reasonable probability that the outcome of the trial would have been different. SRR 1: 7.

The record contains no findings regarding the measurements of the courtroom. Nor does it contain any information about the courtroom's official capacity limits.

Appellant's trial counsel submitted an affidavit in response to appellant's motion for new trial in which he admitted that the jury box remained empty during voir dire. CR 1: 269. The trial court made no findings that appellant's family members posed a risk to the safety or security of the trial participants or the potential jurors. The trial court denied appellant's motion for new trial. SRR 1: 9.

SUMMARY OF THE ARGUMENT

The trial court denied Appellant his Sixth and Fourteenth Amendment right to a public trial when it closed the courtroom during jury selection. The trial court sanctioned the removal of Appellant's sister and brother-in-law from the courtroom prior to the beginning of voir dire. The trial court justified its actions on the basis that the courtroom would not have room to accommodate observers during jury selection. The trial court's justifications were not sufficient to justify the closure.

Trial counsel did not object to the trial court's closure of the courtroom at the time although he was aware that the trial court had authorized the removal of Appellant's family members. Appellant raised this issue for the first time in a motion for new trial. The Court of Criminal Appeals has held that the right to a public trial is a forfeitable right, and that to raise the issue of a public trial on appeal, trial counsel must object at the first available opportunity to preserve the error. The Court of Criminal Appeals' holding conflicts with the framework for error preservation it has established under *Marin v. State*. Under the *Marin* framework, the right to a public trial should be considered a fundamental right that cannot be waived or, at least, a waivable right that requires an active waiver by the defendant.

If trial counsel failed to recognize and protect Appellant's right to an open trial, trial counsel has rendered ineffective assistance of counsel. Trial counsel allowed the trial court to remove Appellant's family members from the courtroom

without objection. Trial counsel failed to protect his client's fundamental right to a public trial and may have failed to preserve the trial court's error for appeal. Trial counsel's error harmed Appellant by removing observers that could have helped trial counsel detect bias against Appellant on the part of the potential jurors.

The trial court violated Appellant's 6th and 14th Amendment right to cross-examine the witnesses to reveal evidence of bias under Texas Rule of Evidence 613(a). The trial court limited trial counsel's ability to present evidence that, at the time the accusations were levelled against Appellant, the complainant's mother (a Mexican citizen) was desperately seeking re-entry to the United States, requested assistance to obtain a visa from the investigating detective within twenty minutes of initiating the investigation into Appellant, and had specifically discussed the possibility of obtaining a visa based on domestic violence claims with a friend prior to reporting accusations of sexual abuse against appellant. The error was not harmless. The State presented no physical evidence, only the testimony of witnesses. The motivation and biases of the witnesses were critical to the defense's theory of the case.

The trial court abused its discretion when it refused to hold a hearing on the appellant's motion for new trial. Appellant's motion for new trial raised substantive issues that needed further development in the record, in particular the appellant's claim that his trial counsel was ineffective when failed to object to the trial court's

decision to close the proceedings to the public during voir dire. Trial counsel must generally be given an opportunity to defend his actions before being labeled ineffective. Trial counsel's affidavit was insufficient to answer all questions raised by the defendant's motion for new trial.

The trial court abused its discretion when it denied appellant's motion for new trial. The affidavits ordered by the trial court and the trial court's findings show that the appellant's right to a public trial were violated. Therefore, the trial court was required to grant appellant's motion for new trial under Texas Rule of Appellate Procedure 21.3(b).

ARGUMENT

I. The trial court violated the appellant's right to a public trial when it removed his family members from the court room before jury selection.

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial." U.S. Const. amend. VI. This right applies to state prosecutions, and it "is incumbent upon the various states to preserve this right in criminal prosecutions in state court." *In re Oliver*, 333 U.S. 257, 273 (1948); *Steadman v. State*, 360 S.W.3d 499, 504 (Tex. Crim. App. 2012). Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Presley v. Georgia*, 558 U.S. 209, 215 (2010).

The right to a public trial extends to the voir dire of prospective jurors. *Presley* at 213. The defendant is entitled to insist that voir dire be conducted in the open because, "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 505 (1984).

To determine whether the appellant's right to a public trial was violated, a reviewing court must "consider whether voir dire was closed, whether any closure was justified, and whether the record contains specific findings to support the closure." *Garcia v. State*, 401 S.W.3d 300, 303 (Tex. App. – San Antonio 2013, no

pet.). The initial burden of proof is on the defendant to show that the trial is closed to the public. If the defendant fails to carry that burden, the analysis is concluded. *Cameron v. State*, 482 S.W.3d 576, 581 (Tex. Crim. App. 2016). "[W]hether a particular defendant's trial was closed to the public should be ascertained on a case-by-case basis after considering the totality of the evidence." *Lilly v. State,* 365 S.W.3d 321, 330 (Tex. Crim. App. 2012). If a defendant shows that the trial is closed to the public, the reviewing court must then determine whether the closure was justified. *Cameron* at 581.

The right to a public trial is not absolute and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, or ensuring that a defendant receives a fair trial. *Waller v. Georgia,* 467 U.S. 39, 45 (1984). However, such cases will be rare, and the proponent of closure must overcome the presumption of openness. *Id.; Lilly* at 329. To rebut the presumption of openness the party seeking to close the hearing must 1) advance an overriding interest that is likely to be prejudiced, 2) the closure must be no broader than necessary to protect that interest, 3) the trial court must consider reasonable alternatives to closing the proceeding, and 4) the trial court must make findings adequate to support the closure. *Waller* at 48; *Lilly* at 329.

The overriding interest to be protected must be weighty and supported by specific facts. "Broad" or "generic" concerns will not serve to justify closure.

Steadman at 506. The "generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident" is insufficient to justify the closure of voir dire. *Presley* at 215. The court must cite a particular interest and the threat to that interest. It must then be able to articulate the interest and the threat to that interest with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 215-16; citing *Press–Enterprise Co. v. Superior Court of Cal., County of Riverside,* 464 U.S. 505, 510, (1984). "Proper findings will identify the overriding interest and how that interest would be prejudiced, why the closure was no broader than necessary to protect that interest, and why no reasonable alternatives to closing the proceeding existed." *Lilly* at 329.

If the closing court has articulated an overriding interest and a specific threat to the interest, the record must then show that it considered all reasonable alternatives to closure. *Lilly* at 329. "A closure is not justified if there are reasonable alternatives to closure that the trial court cannot 'sensibly reject.'" *Garcia* at 303, citing *Steadman* at 509. A reviewing court must look to the totality of the evidence and determine whether the trial court fulfilled its obligation "to take every reasonable measure to accommodate public attendance at criminal trials." *Lilly* at 331. The trial court is "required to consider alternatives to closure even when they are not offered by the parties" *Presley* at 214. "The burden of considering reasonable

alternatives to closure rests squarely upon the trial court itself, regardless of what party seeks the closure, and there is no burden on the defendant to proffer alternatives." *Steadman* at 505.

If the record fails to show that the trial court considered all reasonable alternatives to closure, the reviewing court must reverse the trial court's judgment. *Garcia* at 303. The violation of a criminal defendant's Sixth Amendment right to a public trial is a structural error that does not require a showing of harm. *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991).

A. The trial court closed appellant's trial during voir dire.

The record shows that appellant's family members were present in the courtroom awaiting the start of the trial. Appellant's sister, Hilda Palafox, submitted an affidavit in support of appellant's motion for new trial in which she averred that she and her husband, Jorge Pulido, were sitting in the courtroom prior to the beginning of jury selection. CR 1: 230. The trial court found that there were people sitting in the courtroom, "Hilda Palafox and "Jorge Ramiro,"[2] just before the panel entered the courtroom. SRR 1: 6. In her affidavit, Ms. Palafox stated that the bailiff, in the presence of the trial judge, and with the approval of the trial judge, asked her

[2] The trial court acknowledged the presence of Jorge Pulido in her oral recitation of her findings. The court reporter may have misheard the pronunciation of Mr. Pulido's name because the court reporter was present via Zoom.

and her husband to leave the courtroom. CR 1: 230. Appellant's trial counsel, in his affidavit agreed that appellant's sister and brother-in-law were asked to leave the courtroom. CR 1: 269. Trial counsel stated that the trial court had ordered that the courtroom be cleared before the beginning of voir dire. CR 1: 269. When they hesitated, the trial judge advised them that although it was "not illegal" for them to stay inside the courtroom, there was no room for them. CR 1: 230. Ms. Palafox and her husband remained in the hallway until the jury had been selected. CR 1: 231.

The right to a public trial includes the right to have jury selection open to the public. "The public" does not always have to include the press or disinterested observers. In *Presley v. Georgia*, the Supreme Court held that exclusion of the defendant's uncle from the courtroom during jury selection violated the defendant's Sixth Amendment right to a public trial." *Presley* v. Georgia, 558 U.S. 209, 212 (2010). In *Steadman v. State*, the Court of Criminal Appeals found that the exclusion of the defendant's family members from the courtroom during jury selection violated the defendant's right to a public trial. *Steadman v. State*, 360 S.W.3d 499, 504-05 (Tex. Crim. App. 2012). Similarly, in *Cameron v. State*, the Court of Criminal Appeals found that the trial court had closed the courtroom for voir dire when Cameron's "friends and family were ushered out of the courtroom and not allowed back in." *Cameron v. State*, 490 S.W.3d 57, 62 (Tex. Crim. App. 2014). "The exclusion of even a single person from court proceedings can violate a person's Sixth

Amendment right to a public trial." *Turner v. State*, 413 S.W.3d 442, 449 (Tex. App.—Fort Worth 2012, no pet.).

B. There was no overriding interest that justified the closure of the courtroom during voir dire.

The right to a public trial is not absolute. However, the party seeking to close part or all of a trial must advance an overriding interest that will be prejudiced to justify the closure. *Garcia v. State,* 401 S.W.3d 300, 303 (Tex. App. – San Antonio 2013, pet. ref'd). The trial court sought to close the courtroom for jury selection in this case. It is unclear from the trial court's statements what overriding interest the trial court sought to protect.

The trial record shows only that the trial court thought the courtroom would be crowded, that there was "no room" for appellant's family members, despite the empty jury box. The trial court's comment that the jury box is close to the gallery may indicate a general concern that potential jurors may have felt uncomfortable with members of appellant's family being in the courtroom or that the jurors might overhear comments from the family members.

After appellant filed a motion for new trial, the trial court announced her findings on the record which included her findings that the courtroom in question was "smaller" than the courtrooms usually used for criminal trials in Harris County, that the jury box was the only other place where appellant's family members might have been able to sit in the courtroom, and that the jury box is close to the gallery.

General concerns about the proximity of family members to potential jurors has been specifically rejected by the U.S. Supreme Court as a justification for closing voir dire to the public. In *Presley*, the Court noted that, "[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course." *Presley v. Georgia*, 558 U.S. 209, 215 (2010). The Court of Criminal Appeals reiterated the need for specific facts supporting a closure in *Steadman v. State*. The trial court expressed no specific concerns about the behavior of the appellant's family members.

C. The closure of the courtroom was broader than necessary, and the trial court made no effort to consider reasonable alternatives.

Trial counsel stated in his affidavit that there was no discussion about possible accommodations to allow appellant's family members to observe voir dire. Appellant's trial attorney and appellant submitted affidavits in conjunction with appellant's motion for new trial in which they both averred that the jury box remained empty during voir dire. In *Steadman*, the Court of Criminal Appeals suggested that allowing the defendant's family members to sit in the the empty jury box could have been a reasonable alternative to closing the courtroom during voir dire. *Steadman v. State*, 360 S.W.3d 499, 510 (Tex. Crim. App. 2012).

Appellant had two family members who wished to observe jury selection. CR 1: 230. Appellant's family members could have been seated in the jury box in the chairs furthest from the gallery where the potential jurors sat. CR 1: 269. The trial court did not offer to allow appellant's family members to sit in the jury box during voir dire, nor did it suggest any other reasonable alternative to removing them from the courtroom entirely. SRR 1: 6-7.

In her findings of fact, the trial court did not enumerate any alternatives that she considered before closing the courtroom. She did not deny that seating Mrs. Palafox and Mr. Pulido in the jury box might have been a viable alternative to closing the courtroom. SRR 1: 6. She also indicated that there might have been "other considerations regarding location and prospective juror placement." SR 1: 6. Instead, she found that defense counsel did not seek the trial court's permission to allow the family members to remain in the courtroom or to be seated in the jury box. But "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. " *Presley v. Georgia*, 558 U.S. 209, 215 (2010). There is no burden on the defendant to proffer alternatives. *Steadman v. State*, 360 S.W.3d 499, 505 (Tex. Crim. App. 2012).

D. The trial court's findings are insufficient to justify the closure of the courtroom during voir dire.

The trial court did not create written findings of fact regarding the closure of the trial court. The trial court's oral findings do not clearly identify an overriding

interest that required the removal of appellant's family members and the closure of the courtroom for voir dire. Findings that will justify the closure of a trial must identify the overriding interest that the court seeks to protect. The trial court's finding do not identify a specific concern or interest that will be served by closing the proceedings. If the reviewing court reads the findings generously, it may find an interest in preventing overcrowding, but the findings do not specify how the court's chosen actions were no broader than necessary. In fact, the findings suggest that alternatives were available, but the trial court did not consider them because defense counsel did not ask that they be considered. Based on these findings and the trial record, the trial court's actions were unjustified and deprived the appellant of his right to a public trial.

The right to a public trial is a fundamental constitutional right. When a trail court deprives a defendant of his right to a public trial, the error is structural and there is no harm analysis. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907 (2017). The trial court's judgment must be reversed, and the case remanded for a new trial.

II. The right to a public trial should be considered a "waivable" right of the defendant under *Marin v. State.*

Appellant's counsel did not object to the trial court's removal of appellant's family members from the courtroom before the beginning of voir dire. Under the current case law, a defendant's 6th Amendment right to a public trial is subject to forfeiture. *Peyronel v. State*, 465 S.W.3d 650, 653 (Tex. Crim. App. 2015).

Appellant respectfully argues for a change in the law. The *Peyronel* court based its decision on a survey of other jurisdictions rather than an analysis under *Marin v. State*. When the *Marin* criteria are properly applied, the right to a public trial should be considered either an absolute requirement, or at least a category two right, a right that cannot be forfeited, but must be affirmatively waived by the defendant.

Under *Marin*, there are three distinct types of rights: "(1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request." *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993). The first category of rights are the "[A]bsolute requirements and prohibitions… can't lawfully be avoided even with partisan consent." *Id*. at 280. Because implementation of these absolute requirements and prohibitions is not optional, they cannot be waived or forfeited. *Id.* at 279. The second category of rights, waivable rights, may be given up by the defendant. But though the defendant may waive a category two right, "he is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record. *Marin* at 280. Absent an effective waiver, the trial judge has an independent duty to implement these rights even without the explicit request of the defendant. *Id.* If the trial judge fails to do so, the error may be urged for the first time on appeal. *Id*.

In *Peyronel*, the Court of Criminal Appeals purported to answer the question of whether the right to a public trial was a forfeitable right that required a timely objection to preserve error. Although the Court cited the *Marin* framework, it did not analyze the question under the *Marin* framework. Instead the Court reviewed the rulings of diverse jurisdictions, including several other state courts, to determine that the majority of jurisdictions found that a defendant may forfeit the right to public trial.

First, in its survey, the Court cited to many decisions rendered prior to the Supreme Court's ruling in *Presley v. Georgia.* *Peyronel* at 653 n. 8. Second, in many of the cases cited in support of the argument that a defendant may *forfeit* the right to a public trial, the defendant in that case *waived* the right to a public trial by agreeing to the closure. *Id*. at n. 6 & 7. The Court describes these as cases of "invited error," but in essence, the defendant in those cases either actively agreed to, or asked for, the closure. In its *Marin* framework, the Court distinguishes between rights that must be actively waived (category 2) versus those that may be forfeited by failure to object (category 3). Cases in which a defendant knowingly and intelligently waived his right to an open trial support the designation of the right to a public trial as a category 2 *Marin* right.

The Court further justifies labeling the right to a public trial as forfeitable right by citing to *Levine v. United States*. *Levine* is a sixty-four year old decision that

predates *Waller v. Georgia* and *Presley v. Georgia.* It is also factually distinguishable in that it deals with a grand jury proceeding that became a contempt proceeding and the right to a public trial in that case derived from the 14th Amendment Due Process clause, not the 6th Amendment as in this case. *Levine v. U.S.*, 362 U.S. 610, 616 (1960).

Whether a right of a defendant is a category-three forfeitable right under *Marin* turns upon whether the trial judge has an independent duty to ensure compliance with the requirement or whether compliance need be given only upon partisan request. *Proenza v. State*, 541 S.W.3d 786, 797 (Tex. Crim. App. 2017) "*Marin* places particular emphasis on the various respective "dut[ies]" faced by trial judges and litigants in our adversarial adjudicatory system." *Id.* "A law that puts a duty on the trial court to act *sua sponte,* creates a right that is waivable only. It cannot be a law that is forfeitable by a party's inaction." *Mendez v. State*, 138 S.W.3d 334, 342 (Tex. Crim. App. 2004).

The case law makes clear that "trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. " *Presley* at 215. In fact, "trial courts are required to consider alternatives to closure even when they are not offered by the parties…The public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia*, 558 U.S. 209, 214 (2010). The law places a duty on the trial court to act sua sponte to ensure a

public trial. Under the frameworks established by our court system, the right to public trial should be waivable only upon a knowing and intelligent waiver by the defendant.

III. If appellant's trial counsel forfeited the defendant's right to a public trial, appellant's trial counsel rendered ineffective assistance of counsel.

The 6th Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution guarantee the defendant the right to the effective assistance of counsel. U.S. Const. Amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PRO. ANN. ART. 1.051 (West Supp. 2016); *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

To obtain relief on the basis of ineffective assistance of counsel, the appellant must show that his attorney performed deficiently, and that the attorney's deficient performance harmed him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the appellant must show deficient performance—that the attorney's error was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. To show deficient performance, appellant must prove by a preponderance of the evidence that his counsel's representation fell below the standard of professional norms. Second, the defendant must show that the attorney's error "prejudiced the defense." *Id*.

In assessing a claim of ineffective assistance, there is a presumption that counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *Strickland*, 466 U.S. at 689. However, if "no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as [he] did." *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). A single egregious error of omission or commission by counsel has been held to constitute ineffective assistance, even in the absence of a record setting forth counsel's reasons for the challenged conduct. *Vasquez v. State*, 830 S.W.2d 948, 950-51 (Tex. Crim. App. 1992).

When an appellant raises a claim of ineffective assistance of counsel on the basis that trial counsel forfeited the appellant's right to a public trial, *Strickland* prejudice is not shown automatically. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017). To meet the prejudice prong of the *Strickland* analysis, the defendant must show either a reasonable probability of a different outcome in his or her case or show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair. *Id.* at 1911. The burden is on the defendant to show either a reasonable probability of a different outcome in his or to show that the particular public-trial violation was so serious as to render his or her

trial fundamentally unfair. *Monreal v. State*, 546 S.W.3d 718, 726 (Tex. App. – San Antonio 2018, no pet.)

Appellant's trial counsel did not object to the trial court's closure of the courtroom for voir dire. CR 1: 269. Trial counsel admitted in his affidavit that he was present in the courtroom when the trial court via her bailiff directed appellant's sister and brother-in-law to leave the courtroom. CR 1: 269. Trial counsel also admitted that he did not object to the trial court's closure of the courtroom. CR 1: 269. He did not suggest that appellant's family members posed a risk to the safety of the proceedings. Nor did he suggest that they might say something inappropriate to the members of the jury panel. Trial counsel also stated in his affidavit that the jury box remained empty during voir dire and could have accommodated appellant's family members. CR 1: 269. Trial counsel's stated reason for failing to object to the trial court's violation of appellant's right to a public trial was that he "did not feel that those individuals sitting in the jury box would be helpful." Trial counsel did not elaborate as to why he did not think it would be helpful. CR 1: 269.

"The Sixth Amendment guarantees an accused the benefit of trial counsel who is familiar with the applicable law." *State v. Bennett*, 415 S.W.3d 867, 879 (Tex. Crim. App. 2013)(Price, dissenting). To render effective assistance to his client, "a lawyer must be sufficiently abreast of developments in criminal law aspects implicated in the case at hand." *Ex Parte Welch*, 981 S.W.2d 183, 185 (Tex. Crim.

App. 1998). The right to a public trial is specifically enumerated in the 6th Amendment to the U.S. Constitution. The U.S. Supreme Court has held that state criminal proceedings must be open to the public (including the defendant's family members) since at least the Court's decisions in *In re Oliver* and *Waller v. Georgia*. *Waller v. Georgia* was handed down in 1984, forty years ago. In particular, the U.S. Supreme Court ruled that the 6th Amendment right to a public trial includes the right to a public voir dire during a state court criminal trial in 2010, fourteen years ago, in *Presley v. Georgia*. The Court of Criminal Appeals adopted that Supreme Court precedent in *Steadman v. State* in 2012 and all the lower courts of appeal in Texas have applied this precedent as well. These are not new precedents. Trial counsel should have known that the trial court's order violated his client's fundamental constitutional right to a public trial and objected to the closure.

Trial counsel's error prejudiced the appellant. To show prejudice, the appellant must show "that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." In *Dixon v. State*, the Court of Criminal Appeals found that the right a public trial was meant to address the danger of secret trials which history had proven "were effective instruments of oppression." *Dixon v. State*, 595 S.W.3d 216, 224-25 (Tex. Crim. App. 2020). A secret trial is fundamentally unfair to the defendant on trial. The Fourth Court of Appeals indicated this as well in *Monreal v. State*. In *Monreal*, the defendant's sisters were

excluded from the State's portion of voir dire by the bailiff (and only the bailiff). The rest of the trial open to the public. *Monreal* at 728. The court found that Monreal failed to demonstrate prejudice because the bailiff excluded the sisters only from a portion of voir dire and the rest of the trial was open to any observers. *Id*.

In this case, the appellant's trial was closed at the direction of the trial court without a given reason for the entirety of voir dire, a crucial stage of the trial. If the trial court's reasoning was that the courtroom would be overcrowded, it is clear that the trial court would not have allowed other potential spectators into the courtroom for voir dire had they appeared. There were no witnesses to the voir dire proceedings outside of the trial participants, meaning the lawyers for the appellant and the state, the court personnel and the prospective jurors. There were no other observers to ensure that "the judge and the prosecutor [carried] out their duties responsibly." *Waller* at 46. The trial was carried out at the Family Law Center, away from the other criminal courts where other lawyers or the press might stop in to watch the trial. The voir dire proceedings, then, were conducted in secret, a practice that is fundamentally unfair to the defendant.

Trial counsel's representation fell below the standard of reasonable professional norms which require defense counsel to know the law applicable to the case. His failure protect his client's right to a public trial and to preserve that error

for appeal harmed appellant by creating a trial proceeding conducted in secret, a circumstance that is inherently unfair to the defendant.

IV. The trial court violated the appellant's right to confront the witnesses against him when it refused to allow trial counsel to question the witnesses about K.E.'s attempts to obtain a U-visa.

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a defendant the right to cross-examine witnesses. U.S. Const. amend. VI; *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000). The Sixth Amendment should be liberally construed to give appropriate constitutional protection to the defendant. *Saglimbeni v. State,* 100 S.W.3d 429, 435 (Tex. App. – San Antonio 2002, pet. ref'd)

A defendant may cross-examine a witness on any subject "reasonably calculated to expose a motive, bias or interest for the witness to testify." *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996); *Sansom v. State*, 292 S.W.3d 112, 118 (Tex. App. – Houston [14th] 2008, pet ref'd). The right to cross-examination also "includes the right to impeach the witness with relevant evidence that might reflect bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any impairment or disability affecting the witness's credibility." *Virts v. State*, 739 S.W.2d 25, 29 (Tex. Crim.

App. 1987). Therefore, the proper scope of cross-examination includes "all facts and circumstances which, when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only." *Koehler v. State*, 679 S.W.2d 6, 9 (Tex. Crim. App. 1984) (citing *Jackson v. State*, 482 S.W.2d 864, 868 (Tex. Crim. App. 1972)). Jurors are entitled to have the benefit of the defense theory before them so that they can make an informed decision regarding the weight to accord the witness's testimony, even though they may ultimately reject the theory. *Maxwell v. State*, 48 S.W.3d 196, 199 (Tex. Crim. App. 2001) (citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)).

A U-Visa is "an immigrant permit for victims of violent crime." *Aguilar v. State*, No. 02-14-00119-CR, 2015 WL 1775634, at *1 (Tex. App.-Fort Worth Apr. 16, 2015, no pet.) (mem. op., not designated for publication). It authorizes the granting of nonimmigrant status to certain aliens or noncitizens who are not otherwise legally in the United States, allowing them to remain if they are the victims of crimes such as sexual assault, sexual abuse, and sexual exploitation, or the qualifying family members of such victims. 8 U.S.C. §§ 1101(a)(15)(U)(ii), (iii), 1184(p). A witness's immigration status and attempts to obtain such a visa may be relevant to the witness's bias and motivation to lie. *Pabon v. State*, No. 02-18-00517-CR, at *9 (Tex. App. – Fort Worth Aug. 29, 2019, no pet.).

In *Samson v. State*, this Court of Appeals found that the trial court erred after the trial court refused to allow the defendant to cross-examine a witness on the issue of her immigration status. *Samson v. State*, 292 S.W.3d 112, 119 (Tex. App. – Houston [14th Dist.] 2008, pet. ref'd). The Court found that by refusing to allow defense counsel to cross-examine the complainants' mother on the issue of her immigration and citizenship status, the trial court effectively denied the defendant the right to present his case to the jury.

The Second Court of Appeals has dealt with this question in several unpublished opinions. In *Chavez v. State*, the Court acknowledged that immigration status and the opportunity to obtain a U-Visa may be a legitimate subject for cross-examination, but the defendant shows that the witness's U-Visa application and her immigration status were relevant. "To establish relevance, Chavez was required to show that Mother's immigration status and U-Visa application were logically connected to her alleged bias or motive to lie." *Chavez v. State*, No. 02-22-00090-CR, at *11 (Tex. App. Nov. 9, 2023). The Court focused on the timeline of "Mother's" allegations to determine that "Mother's" immigration issues were irrelevant to the allegations against Chavez. In particular, the Court found that the complainants' mother did not know that she could apply for U-Visa until after the children had made allegations, and therefore the promise of a U-Vias could not have been an inducement to encourage her to fabricate the allegations. *Id*. at *11-12.

In this case, the timeline is much clearer. As detailed in the affidavits provided and in some the testimony at the trial, K.E. was actively seeking a way to gain legal entry and residence in the United States for years before the allegations were made. She had consulted at least two immigration attorneys before she made the allegations. This timeline demonstrates that K.E.'s U-Visa application was highly relevant in the context of the allegations against the appellant. The trial court should have allowed trial counsel to cross examine her about her citizenship status and her efforts to obtain legal residency.

The trial court's error harmed the defendant. This case solely rested on the testimony of the complainant and her mother, K.E. Appellant's counsel explained to the trial court in great detail why K.E.'s immigration status and her despair at the news that she would not be able to legally emigrate to the U.S. were relevant to the charges levelled against appellant. There was no physical evidence presented in this case. The only direct evidence of abuse came from the child and her mother, K.E. The credibility of these witnesses was the foundation of the State's case. K.E.'s motivation to lie and coach the testimony of K.B. was trial counsel's entire theory of the case. The trial judge's rulings prevented him from establishing the function of a "U-visa" for K.E., that K.E. had discussed the possibility of obtaining this type of visa with multiple people including her immigration attorney, the detective investigating the case, and another attorney possibly working in conjunction with

Catholic Charities. He was also prevented from pointing out that K.E. had, in fact, obtained a U-visa.

When it the trial court refused to allow defense counsel to cross-examine the K.E. and the complainant about her motives and machinations to return to the U.S. and become a legal resident, the trial court essentially allowed the State's theory of the case to go unchallenged.

V. The trial court abused its discretion when it denied appellant's request for a hearing on his motion for new trial.

On March 14, 2024, the trial court informed counsel that she would not grant a hearing on the motion for new trial and made a docket entry to reflect her decision. An appellate court reviews the trial court's decision to deny a hearing on a motion for new trial under an abuse of discretion standard. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004). Under this standard the trial court's decision may only be reversed if it was so clearly wrong as to lie outside the zone of reasonable disagreement. *Smith v. State*, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009). The reviewing court examines whether the trial court acted without reference to any guiding rules and principles. First the court considers whether the motion for new trial was technically sufficient to entitle Appellant to a hearing. To be considered on the merits, the motion for new trial must be 1) timely filed; 2) properly presented, and 3) be adequately verified or include an unsworn declaration by an inmate

provided in lieu of verification. *Green v. State*, 554 S.W.3d 785, 789 (Tex. App – Houston [14th Dist.] 2018, pet. ref'd).

Appellant's motion for new trial met all technical requirements. Appellant's motion for new trial was timely filed. A defendant may file a motion for new trial "no later than 30 days after the trial court imposes or suspends sentence in open court." Tex. Rule App. Proc. 21.4 (a). The trial court sentenced appellant to serve 25 years in prison on February 8, 2024. CR 1: 194. The thirtieth day following the pronouncement of the judgment was March 9, 2024, a Saturday. Appellant filed his motion for new trial on March 11, 2024, the first Monday after the thirtieth day. CR 1: 216. The trial court found that the motion for new trial was timely filed. SRR 1: 5.

The motion for new trial must be appropriately verified. "As a prerequisite to obtaining a hearing, a motion for new trial must be supported by affidavit, either of the accused or someone else, specifically showing the truth of the grounds of attack." *State v. Moreno*, 297 S.W.3d 512, 519 (Tex. App. – Houston [14th Dist.] 2009, pet. ref'd). The appellant's motion for new trial was supported by two affidavits and one sworn statement by the defendant who was incarcerated in the Harris County jail. Appellant dictated and signed an inmate's declaration in support of his motion for new trial pursuant to Texas Civil Practice and Remedies Code §§ 132.002 - .003. *Green v. State*, 264 S.W.3d 63, 67 (Tex. App. – Houston [1st Dist.] 2008, pet. ref'd).

Appellant's motion for new trial was properly presented. The defendant must "present the motion for new trial to the trial court within ten days of filing it." Tex. Rule App. Proc. 21.6. The trial court signed a certificate of presentment on March 14, 2024 within ten days of the date of filing. CR 1: 259. Appellant's motion for new trial was timely filed, timely presented, and appropriately verified. It met all technical requirements necessary to entitle him to a hearing.

The motion for new trial must be supported by facts that are sufficient to put the trial court on notice that grounds for relief exist. *Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1993). The purpose of the hearing is to fully develop the issues raised in the motion for new trial. *Martinez v. State*, 74 S.W.3d 19, 21 (Tex. Crim. App. 2002). When a motion for new trial presents matters that are not determinable from the record, the trial court abuses its discretion in declining to hold an evidentiary hearing. *Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993); *Smith v. State*, 286 S.W.3d 333, 337 (Tex. Crim. App. 2009).

In his motion for new trial, appellant raised the claim that the trial court violated appellant's right to a public trial, and that his counsel was ineffective for failing to protect his right to a public trial and that the trial court violated the appellant's right to cross-examine the State's witnesses. The trial court's decision to close the trial for voir dire does not appear anywhere in the trial record. Appellant was entitled to a hearing on his motion for new trial to further develop his claim that

his right to a public trial had been violated. Appellant's motion for new trial met all technical requirements and raised multiple issues that might have resulted in the trial court granting Appellant relief. Appellant was entitled to a hearing on the motion for new trial.

VI. The trial court abused its discretion when it failed to grant Appellant's motion for new trial.

Appellant filed a motion for new trial under Rule 21.1 of the Texas Rules of Appellate Procedure. Under Texas Rule of Appellate Procedure 21.3(b), "The defendant must be granted a new trial…when the court has committed some other material error likely to injure the defendant's rights." Tex. R. App. P. 21.3.

An appellate court reviews a trial court's decision to deny a motion for new trial under an abuse of discretion standard. *Colyer v. State,*428 S.W.3d 117, 122 (Tex.Crim.App.2014). A trial court abuses its discretion when its decision is arbitrary or unreasonable. *Id.* That threshold is met when no reasonable view of the record could support its ruling or when the decision fails to comport with controlling rules and principles. *Id.*; *Lyles v. State,*850 S.W.2d 497, 502 (Tex.Crim.App.1993). The reviewing court reviews the evidence in the light most favorable to the ruling, but it reviews the trial court's resolution of questions of law de novo. *Hayes v. State*, 484 S.W.3d 554 (Tex. App. – Amarillo 2016, no pet).

In his motion for new trial, Appellant alleged that the trial court violated his right to a public trial by having his family members removed from the courtroom

and having the courtroom closed to spectators prior to the beginning of voir dire without sufficient cause. The trial court's findings were legally insufficient to justify the closure under well-settled case law. Trial counsel's affidavit corroborated the appellant's claim that the trial court had closed the proceedings in violation of the appellant's rights. In denying the appellant a public trial, the trial court committed structural error that adversely affected the defendant's substantial rights.

In this context, it does not matter that trial counsel may have forfeited his client's right to a public trial. "There is no requirement in Texas law that, before a trial court may grant a motion for new trial, the moving party is required to show that he has timely preserved his claim of error for appeal." *State v. Herndon*, 215 S.W.3d 901, 909 (Tex. Crim. App. 2007). "Even errors that would not inevitably require reversal on appeal may form the basis for the grant of a new trial, if the trial judge concludes that the proceeding has resulted in "a miscarriage of justice." *Id.* at 907.

Appellant brought these claims to the trial court in a timely, verified motion for new trial. As has been discussed above, the trial court acknowledged her action and her failure to make reasonable accommodations to allow a public trial in her findings. As there is no requirement to show that appellant's counsel preserved error to be entitled to new trial, the trial court's actions were unreasonable and arbitrary. This court should reverse the trial court's ruling and remand this case for a new trial.

PRAYER FOR RELIEF

For the reasons stated herein and upon the authority herein the Appellant, Enrique Palafox, requests that this Court REVERSE and REMAND the case to the trial court for further proceedings.

Respectfully submitted,

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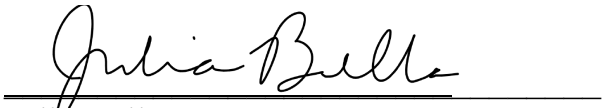
I hereby certify that a true and correct copy of the foregoing brief was duly delivered to Harris County District Attorney's Office, on the date of filing through the e-file system.

BY: 
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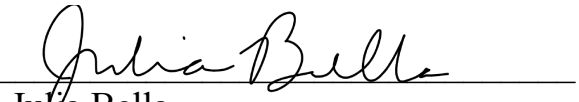
By: 

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