Nos. 14-24-00762-CR, 14-24-00763-CR, 14-24-00764-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

LAWRENCE REED
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Nos. 1733562, 1733560, 1733559
From the 180th District Court of Harris County, Texas
Hon. DaSean Jones, Judge Presiding

BRIEF FOR THE APPELLANT

Oral Argument Not Requested

Alexander Bunin
Chief Public Defender
Harris County, Texas

Sophie Bossart
Assistant Public Defender
Harris County, Texas
SBN: 24129374
1310 Prairie St, 4th Floor
Houston, Texas 77002
Phone: (713) 274-6700
Fax: (713) 368-9278

Counsel for Appellant

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	Lawrence Reed
STATE OF TEXAS:	Kelly Marshall Elizabeth Liberman Assistant District Attorneys Harris County, Texas 1201 Franklin St. Houston, Texas 77002
DEFENSE COUNSEL AT TRIAL:	Thomas Radosevich Attorney at Law 1821 Houston Avenue Houston, TX 77007
DEFENSE COUNSEL ON APPEAL:	Sophie Bossart Assistant Public Defender Harris County Public Defender's Office SBN: 24129374 1310 Prairie St., 4th Floor Houston, Texas 77002
PRESIDING JUDGE:	Hon. DaSean Jones 180th District Court Harris County, Texas 1201 Franklin St. Houston, Texas 77002

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STATEMENT OF THE CASE

On October 8, 2021, Lawrence Reed (Appellant) was charged by three separate indictments—two charging him with aggravated assault with a deadly weapon (second degree felonies) and one with murder (a first degree felony). (C.R.1 50, C.R.2 31, C.R.3 65).[1] Lawrence originally pled guilty on each charge and planned on proceeding to jury trial for punishment. (2R.R. 13-16). Lawrence then requested to withdraw his pleas of guilty, which the trial court allowed. (3R.R. 11-12, 21-22, 25). Lawrence then pled not guilty and proceeded with a trial by jury. A jury found him guilty on the two assaults and the murder and sentenced him to twenty years on each assault and life on the murder (with the possibility of parole) in the Texas Department of Criminal Justice – Correctional Institutions Division. (C.R.1 151-53; C.R.2 130-32; C.R.3 387-89). The jury also assessed a fine of $10,000 on each of the three cases. (C.R.1 151-53; C.R.2 130-32; C.R.3 387-89). The trial court certified Appellant's right of appeal and he timely filed notice of appeal. (C.R.1 157-58, 161-62; C.R.2 135-36, 140-41; C.R.3 393-94, 402-03).

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

[1] There are three Clerk's Records in this case. The Clerk's Record for the first aggravated assault, trial court cause number 1733559, will be cited as "C.R.1"; the Clerk's Record for the second aggravated assault, trial court cause number 1733560, will be cited as "C.R.2"; and the Clerk's Record for the murder case, trial court cause number 1733562, will be cited as "C.R.3." All cases having been tried together, the Reporter's Record will be cited as "R.R." preceded by the volume number.

ISSUES PRESENTED

Issue I: Lawrence Reed was denied his right to effective assistance of counsel.

Issue II: The trial court erred in denying the request for a jury instruction on the special issue of sudden passion. Alternatively, defense counsel rendered ineffective assistance if this request is deemed unpreserved.

STATEMENT OF FACTS

At trial, the State presented evidence that Lawrence Reed shot and killed his wife, and shot two other members of their family. *E.g.*, (4R.R. 88-96). His wife and their kids had taken a trip to Chicago; when they returned, Lawrence made attempts to get his wife to read letters and cards he wrote to prevent her from leaving the marriage. (4R.R. 21-24, 83-85, 183-88, 194-95). When she refused to read them and her daughter attempted to intervene, witnesses testified Lawrence began shooting them. *Id.* His wife died due to a gunshot wound and her daughter and son sustained gunshot injuries. (3R.R. 108-26; 4R.R. 205). Lawrence had a stroke in 2017. (4R.R. 27).

Lawrence originally pled guilty to all three charges due to pressure from his attorney. (2R.R. 13-16; 5R.R. 17). He withdrew his pleas and proceeded to jury trial. (3R.R. 11-12, 21-22, 25).

SUMMARY OF THE ARGUMENT

Issue I: Lawrence Reed was deprived of his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, Section 10 of the Texas Constitution. His defense attorney at trial, Tom Radosevich, rendered a wholesale failure of representation that constituted a constructive denial of counsel under *United States v. Cronic*. When an attorney's representation as a whole fails to subject the state's case to "meaningful adversarial testing," as here, a reviewing court need not conduct a prejudice assessment. Even if this Court determines Radosevich's performance met the bare minimum standard during most of the guilt/innocence phase of trial, he abandoned his efforts at closing argument and throughout the sentencing phase, depriving Lawrence of effective assistance at a critical stage of proceedings.

Issue II: The trial court erred in denying the request for a sudden passion instruction. Even though trial counsel, in support of his request, offered as evidence only the fact that his client was absent and argued that that somehow showed sudden passion, there was evidence in the State's case in chief that showed sudden passion. Lawrence's wife was leaving him and he wrote her letters and cards professing his love and devotion to her to try to get her to stay with him. When she returned from a trip, he begged her to read the cards and for hours she refused; he eventually approached her—she continued to refuse and one of her daughters attempted to intervene. Lawrence then, according to witnesses, snapped and shot his wife and two of her kids. This evidence was enough to entitle Lawrence to a sudden passion instruction, and there was some harm because

some likelihood exists that the jury would have made a finding of sudden passion. If this Court determines this issue is not preserved for appellate review, then defense counsel was ineffective in failing to preserve it under *Strickland*.

ARGUMENT

Issue I: Lawrence Reed was denied his right to effective assistance of counsel.

A. Applicable Law and Standard of Review

A person charged with a crime is guaranteed the assistance of counsel by the Sixth Amendment to the United States Constitution and Article 1, § 10 of the Texas Constitution. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963). "Assistance of counsel" refers not just to the presence of counsel, but to effective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 654 (1984); *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). If a defendant received ineffective assistance of counsel, the remedy is a new trial. *United States v. Morrison*, 449 U.S. 361, 364-65 (1981) (listing cases) (citations omitted).

To prevail on a claim of ineffective assistance of counsel, the defendant normally must show that (1) counsel's performance was deficient and (2) a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex parte Lane*, 303 S.W.3d 702, 707 (Tex. Crim. App. 2009). However, in some extraordinary cases, a defendant will not be required to show prejudice—these cases are where "the process loses its character as a

confrontation between adversaries" and the "circumstances . . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 656-58. In other words, a defendant is denied his Sixth Amendment right to counsel when his attorney "fails to subject the prosecution's case to meaningful adversarial testing" and prejudice is presumed. *Id.* at 659-60; *Bell v. Cone*, 535 U.S. 685, 697 (2002) (noting "the attorney's failure must be complete").

The Sixth Amendment right to counsel "extends to all critical stages of the criminal proceeding, not just the actual trial." *Gilley v. State*, 418 S.W.3d 114, 120 (Tex. Crim. App. (Tex. Crim. App. 2014), quoting *Hidalgo v. State*, 983 S.W.2d 746, 752 (Tex. Crim. App. 1999). *See also Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) ("Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings."). Specific stages of a trial have been held to be "critical" for the purpose of effective assistance of counsel, like an in-camera hearing on the admissibility of certain evidence. *See LaPointe v. State*, 166 S.W.3d 287, 299 (Tex. App.—Austin 2005, pet. granted), *aff'd by LaPointe v. State*, 225 S.W.3d 513, 523-24 (Tex. Crim. App. 2007). "[S]entencing is a critical stage of the criminal proceeding." *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Normally, "the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable

and professional." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). But the Texas Court of Criminal Appeals has found a constructive denial of the right to counsel on a cold record, and in a case analogous to Lawrence's. *Cannon v. State*, 252 S.W.3d 342, 349-50 (Tex. Crim. App. 2008). The standard is whether "defense counsel's behavior, considered as a whole, constructively denied appellant his Sixth Amendment right to the effective assistance of counsel." *Id.* at 350 (explaining that although defense counsel was "physically present in the courtroom at all the requisite times, effectively boycotted the trial proceedings and entirely failed to subject the prosecution's case to meaningful adversarial testing"). *Ibid.* In *Cannon*, the court reversed because "defense counsel abandoned his role as advocate for the defense and caused the trial to lose its character as a confrontation between adversaries." *Ibid.* (noting prejudice in such a case is "legally presumed").

B. Analysis

This case is about what we as criminal defense attorneys owe to our clients—not just legally and ethically, but morally and systemically. Lawrence Reed was charged with one of the most serious crimes possible: murder. (C.R.3 65) Alongside that, he was charged with two aggravated assaults with a deadly weapon. (C.R.1 50, C.R.2 31). Lawrence was appointed an attorney to represent him, which is his fundamental right. *Powell v. Alabama*, 287 U.S. 45, 65 (1932). But in a stunning plot twist, the trial court and the State itself did more to protect Lawrence's rights in the criminal trial process than

his own attorney. *E.g.*, (2R.R. 114-18; 5R.R. 31-32).[2] From pretextual objections to showing open disdain for his own client before judge and jury, Tom Radosevich threw Lawrence under the bus during his (waived) closing remarks after slow-coding his case during the guilt/innocence phase of trial.

The Sixth Amendment guarantees an accused the right to "assistance of counsel for his defense." U.S. CONST. amend. VI. A violation of the Sixth Amendment right to counsel occurs when an accused's counsel "fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659-60. "While a criminal trial is not a game in which participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *United States ex. rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975). Constructive denials of counsel are often found where an attorney has been appointed but refuses to participate in trial. *E.g.*, *Martin v. Rose*, 744 F.2d 1245, 1250-51 (6th Cir. 1984) (holding constructive denial of counsel under *Cronic* where attorney refused to participate in trial).

In ineffective assistance of counsel claims under *Cronic*, courts consider counsel's representation as a whole. *Cannon*, 252 S.W.3d at 350. The standards of performance for lawyers are relevant. *See Strickland*, 466 U.S. at 688 ("Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and

[2] These are instances that occurred during voir dire and a discussion on the jury charge, which are discussed *infra* pp. 10-11, 16.

hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. [] From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.") (internal citations omitted). However, there are cases where constructive denials of counsel have been found where the attorney did partially participate in trial. For example, the *Cannon* court held the right to counsel was denied when counsel was present and even made some substantive arguments (like asking for a directed verdict and brought "to the trial court's attention [its] mistake in sentencing, which could have affected appellant." *Cannon*, 252 S.W.3d at 350.

This case is similar to *Cannon*. In *Cannon*, "defense counsel, at the start of voir dire, moved for a continuance and recusal of the trial court judge." *Id.* "The trial court first denied the motion for recusal and then, a few moments later, it denied the motion for continuance." *Id.* "Immediately after the trial court denied the motion for recusal, defense counsel declared that he was 'not ready for this trial,' that he would 'be unable to effectively represent [his] client,' and that he could, therefore, 'not participate' in the trial." *Id.* "Thereafter, defense counsel declined to participate in jury selection, declined to enter a plea for his client, declined to make an opening or closing argument to the jury, declined to cross-examine any of the State's witnesses, declined to make any

objections, declined to offer any defense, declined to request any special jury instructions, and declined to offer any evidence or argument with respect to punishment." *Id.* All that trial counsel did during the proceedings was "move for an instructed verdict" and brought "to the trial court's attention the trial court's mistake in sentencing, which could have affected [Cannon]." *Id.*

Here, defense counsel fell short in several of his ethical duties and in his general performance as a trial lawyer. TEX. CODE CRIM. PROC. art. 26.04 ("Procedures adopted under Subsection (a) shall…(5) ensure that each attorney appointed from a public appointment list to represent an indigent defendant perform the attorney's duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics. . . ."). Lawyers have a duty of competence and diligence. TEX. R. DISC. PROF'L COND. 1.01. Additionally, lawyers must not "assert or controvert an issue . . . unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." TEX. R. DISC. PROF'L COND. 3.01 We also owe a general duty of loyalty to clients, which is connected to our duty to avoid conflicts of interest. TEX. R. DISC. PROF'L COND. 1.06 (noting in Comment 1 that "[l]oyalty is an essential element in the lawyer's relationship").

Here, defense counsel made some objections (which, at times, were questionable) and requested jury instructions, but his representation as a whole was so lacking throughout the trial that it amounted to no counsel at all, and he ultimately abandoned all his purported "efforts" at a critical stage of the proceedings. A review of

the entire record demonstrates that although trial counsel's actions were not a blatant boycott, they constructively functioned in very much the same manner and may as well have been one. Defense counsel, Attorney Radosevich, provided representation that already started off deficient, but quickly deteriorated from beginning to end. This rapid decline went as follows:

Voir Dire

During voir dire, it appears from the surface that defense counsel attempted to engage in representing Lawrence, but a closer look reveals he only made choices harmful to his client. For example, he objected to the striking of juror number 4. This juror had family killed by gun violence, and said he has a bias against the system; he said he can keep an open mind, but stated he brought this up to the court for transparency since he did not want to risk making a biased decision *against* Lawrence. Defense wanted to keep him for some reason. (2R.R. 114-17). The trial court struck the juror and rightly expressed incredulousness that defense counsel was objecting to the striking of a juror who stated he had a bias against Lawrence. (2R.R. 117-18).

Additionally, juror number 14 approached and, of his own volition, stated he works "closely with the DA's Office" and the Houston Police Department; he offered this information because the attorneys "didn't ask the right questions." (2R.R. 118-19). Defense counsel did not attempt to ask any follow-up questions about 14's clear bias, which he had been offering up on a silver platter, and did not ask for a for-cause strike

on this juror. (2R.R. 119). Counsel also did not use a peremptory strike and juror 14 was selected to be on the jury. (2R.R. 140).

These are highlights of the questionable choices made by Radosevich at voir dire, but he entirely gave up any semblance of representation after Lawrence decided to withdraw his pleas of guilty post voir dire:

The Plea Withdrawal

"An attorney labors under an actual conflict of interest for Sixth Amendment purposes if, during the course of the representation, the interests of the attorney and his client 'diverge with respect to a material factual or legal issue or to a course of action.'" *Amiel v. United States*, 209 F.3d 195, 198 (2d Cir. 2000), quoting *Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir. 1993). Initially, the strategy was for Lawrence to enter an open plea of guilty on all three charges and focus on punishment. However, Lawrence withdrew his pleas of guilty as he felt he had done so without adequate counsel from Radosevich and without having seen the extent of the evidence.[3]

Radosevich was openly frustrated at his client's choice to go to trial rather than plead guilty, seeming to grow even more resentful after Lawrence complained of defense counsel's quality of representation. Instead of respecting his client's invocation of his right to a jury trial on the merits of the crimes charged and effectively moving for a continuance so he could prepare given this dramatic shift in circumstances, he (sort

[3] He even stated near the end of the trial that he wanted his trial because it was the only way he would get to see the evidence against him. (5R.R. 17).

of) asked for a day, and then told the judge he only needed an hour to prepare for a murder and double-aggravated-assault jury trial. (3R.R. 20, 22, 26). When the parties returned, defense counsel requested to show Lawrence a text from his ex-wife with "solid advice,"[4] but Lawrence still decided he would plead not guilty. Defense counsel stated, "My understanding is that my client is going to plead not guilty, and, of course, I want to repeat that the jury is going to hear that the Defendant has pled not guilty, and I'm concerned what that's gonna—" and the trial court cut him off and stated, "Understood. It's his choice, sir." (3R.R. 30).

Lawrence proceeded to plead not guilty, and the trial began. (3R.R. 31). In a later phase of the trial, even though defense counsel indicated he needed Lawrence to testify in order to make the case he wanted to make, he appeared flustered and frustrated at the situation—particularly that Lawrence chose to go to trial on guilt/innocence. He stated the following (which arguably reveals confidential information and communications):

> Judge, I mean, I guess right now, my client wants to testify; and I guess I would ask the Court to admonish him of the dangers of that. But I'm in the same situation I was in Monday when before -- again, I'm saying this for the record not for the Judge but for the record, when my client pled guilty and then changed his mind on Tuesday morning that changed our approach. I woke up to a new approach on Tuesday morning. Now, my advice to my client would be, I think he has to testify and go with our original plan. So, I mean, obviously there's a huge danger. I've been doing this a while, everybody in this courtroom has been. It's rare that you want your client to testify after the Prosecutors has put on 21 witnesses over

[4] It was implied from the context that the "advice" was to follow through with the guilty pleas. (3R.R. 30).

> two days. I still feel that way, but if he wants to testify, I think my 20 visits and I think our 50 letters and I think our explanation of this situation. And I can address sudden passion here, certainly not in front of the jury yet, and we're going to be addressing that issue down the road are enough. It's a very difficult dilemma. I just want my client to know what he's doing, what we're putting on the record, and what we've talked about all the times we've met over these years and written to him.

(5R.R. 13-14).

The Guilt/Innocence Phase

Radosevich's representation during the State's case in chief was as good as (or possibly even worse than) having no attorney. Radosevich denied Lawrence the right to effective assistance by slow coding the guilt/innocence phase of trial: he lodged very few substantive objections to prejudicial evidence. One of the few substantive objections was to photographs of the deceased's body. Defense counsel objected apparently under 403 that they were "cumulative, inflammatory, and meant to insight the jury toward a problem at punishment." (3R.R. 170). The photographs are not very numerous and not particularly gruesome. (St. Exs. 86-91, 93-95). On the other side of the coin, defense counsel failed to object to countless prejudicial hearsay statements and inadmissible character evidence of the complainant(s). *E.g.*, (4R.R. 23) (no objection to hearsay Gloria, who was on the phone with the complainant when she was shot, testified to the complainant's phone statements); (4R.R. 15) (no objection to testimony that decedent was "hardworking" and held down a job).

Radosevich refused to cross-examine 19 of 21 witnesses.[5] One cross-examination—if one can even call it that—consisted of Radosevich just reviewing what information a law enforcement officer knew and eliciting that no additional shots were fired after the three complainants were wounded. (3R.R. 101-03). The latter is irrelevant given that the trial concerned the shooting of those three complainants.

Regarding the cross-examination of Gloria Junius (the mother of the deceased and the grandmother of the two assault complainants), Radosevich asked whether Gloria knew about her daughter's marital problems, and that Lawrence had had a stroke in 2017. (4R.R. 27). He asked if Gloria knew "it would be hard for Lawrence to just walk out of that house," and an objection to speculation was sustained. (4R.R. 27-28). Defense counsel was invited to rephrase but passed the witness instead. (4R.R. 28). On recross, he tried asking about whether legally married people have the right to be "on the lease [premises]," attempting to establish that Gloria was giving the "impression that the house was her daughter's and she didn't want him in it" but that that was not accurate. (4R.R. 29). The court was confused at the relevance of this and asked if counsel could be more direct with what he was getting at, and defense counsel gave up on this line of questioning. (4R.R. 29). He just asked if the complainant and Lawrence were legally married, to which she responded in the affirmative. (4R.R. 30).

[5] He also attempted a curt cross-examination of one of the aggravated assault complainants at sentencing. (6R.R. 14-15).

The only whiff of representation occurred when Radosevich asked for a jury instruction on unanimity (discussed *infra*). The State asked for an instruction for the jury to not hold Lawrence's absence against him, (5R.R. 29), but then Radosevich held Lawrence's absence against him in front of the jury. (5R.R. 39). He later asked for a sudden passion instruction, but instead of arguing the evidence that supported that instruction, he instead argued Lawrence's absence was evidence that he had killed his wife in sudden passion. (6R.R. 20-22) (defense counsel arguing that he "offered an exhibit that is the lack of aural, visual, tangible, written evidence as an exhibit that would allow the consideration of sudden passion. . . .").[6]

Radosevich at times was not even paying attention to what was happening in trial—when the State finished its direct examination of Juan Lerma, it passed the witness and Radosevich did not realize. (4R.R. 134). The trial court got Radosevich's attention, and Radosevich replied, "Oh, I'm sorry, Judge. I was working on my computer, and I didn't catch the last minute," and then asked if they had passed the witness, then declined to cross-examine him. (4R.R. 134). "[A] lawyer shall not . . . neglect a legal matter entrusted to the lawyer[.]." TEX. R. DISC. PROF'L COND. 1.01 (b, c) ("neglect signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients") (internal quotation marks omitted).

[6] As argued in Issue II *infra*, there was evidence in the State's case in chief at the guilt/innocence phase of trial that supported a sudden passion instruction. This evidence was that Lawrence snapped and pulled the trigger because his wife refused to read the letters and cards he wrote to her in his attempt to save their marriage while she was in the process of leaving him. (4R.R. 55-60, 186-88, 194-95).

i. Jury Charge Discussions

Radosevich requested a unanimity instruction regarding the two theories of murder alleged by the State, though admitted his request was blatantly not supported by law. (5R.R. 25-29). The State requested a jury instruction to not hold Lawrence's voluntary absence against him. (5R.R. 26-30). The trial court granted this request, and the State provided two options. Defense counsel refused to choose an instruction, indicating he thought it would waive an issue on appeal and so he could not participate, and then made the following statements:

> The Defendant had a choice not to shoot anybody to add to the consequences of what the Government proves that he did is just what the Government is trying to do in this instance. He shouldn't be penalized for testifying or not testifying and letting the jury -- tracking the law penalizes him, not tracking the law explains to the jury that they can consider the evidence and protects my client in future proceedings.

(5R.R. 31). The State argued the second option they drafted applied the law and ensured the jury would not use Lawrence's absence against him, and the trial court chose that option. (5R.R. 31-32).

ii. Closing Arguments

At the end of the guilt phase of trial, Radosevich took advantage of Lawrence's absence, blaming his own inability to construct even an elementary closing argument on his own client. He stated, "I'm unable to make a closing argument because my client is not here to assist. I would urge the jury to make no decision. Thank you." (5R.R. 39). This was obviously both legally incorrect and, from a strategic standpoint, indefensible.

This was not only a loyalty issue but also one of competence. The competence issue also manifested in Radosevich's slew of frivolous arguments to the court, including his attempt to offer his client's absence as "evidence" of sudden passion, and his baseless request for the trial court to "not recognize" the verdict despite not knowing "any law on that." (5R.R. 53) (discussed more at length *infra*).

When the jury retired to deliberate and the parties were brought back for the verdict, defense counsel stated, "I'm going to ask the Court on the record to not recognize the jury telling us that it has a verdict because – well, do you want to testify? That's what I want to do. I want to put it on the record. I want to ask my client if he wants me to ask you to not recognize the verdict even though I don't know any law on that." (5R.R. 53). The court responded, "That's not happening. What else do you have, sir?" (5R.R. 53). The court asked if he wanted to put anything else on the record, and defense counsel stated, "I just want to preserve my client's right to do the right thing." (5R.R. 53). Lawrence was brought in, and after another confusing exchange about whether Lawrence wanted defense counsel to ask the judge not to recognize the verdict, Lawrence absented himself and received the relevant admonishments. (5R.R. 55).

The Punishment Phase

Radosevich's "representation" continued to ring hollow. He did not appear to know or recall that a defense attorney does not offer evidence until the State has rested and closed. (5R.R. 7). When the State reoffered all evidence from the guilt phase, Radosevich responded not with any objections, but that the defense was offering "as

evidence[] the fact that [Lawrence]…is not here; and I offer that as evidence of sudden passion." (5R.R. 7). The following exchange occurred:

> THE COURT: Do you have any response to their offer?
>
> MS. LIBERMAN: To reoffer all of the evidence from guilt/innocence.
>
> MR. RADOSEVICH: I am offering as evidence that my client is not here for punishment.
>
> MS. LIBERMAN: Understood.
>
> THE COURT: Did you hear what she said? She said she's reoffering all the evidence from the guilt/innocence into the punishment phase.
>
> MR. RADOSEVICH: I beg pardon, Judge?
>
> THE COURT: Can you guys come closer?
>
> MS. LIBERMAN: Yes, Judge.
>
> (At the Bench.)
>
> THE COURT: So, a moment ago, she said she's reoffering all the evidence from the guilt/innocence phase into the punishment phase. Was there an objection?
>
> MR. RADOSEVICH: Right.
>
> MS. MARSHALL: Do you have any objection?
>
> MR. RADOSEVICH: No.

(5R.R. 7-8). This issue persisted and the trial court had to explain to Radosevich how a trial "normally happens" and essentially coach him through the timeline of the proceedings, warning Radosevich he was trying to "skip a step." (6R.R. 19).

Prior to his strange closing remarks in the guilt/innocence phase, Radosevich had stated to the trial court he was waiving closing argument because of his purported strategy to focus on the punishment phase. (5R.R. 32-34). However, Radosevich failed

to put on a case at all; the initial plan was for Lawrence to testify, but being unprepared for an alternative plan in a case like this is unacceptable. He could have hired an expert or even elicited from one of the two medical doctors who testified for the State that brain damage from a stroke can affect behavior and cause someone to become violent. *See* 34 AM. J. PROOF OF FACTS 3d 1 (1995), *citing* KAPLAN & SADOCK, SYNOPSIS OF PSYCHIATRY, BEHAVIORAL SCIENCES, CLINICAL PSYCHIATRY (6th ed 1991) ("Some damage to the limbic structures in the frontal lobe can cause apathy, decreased drive, poor grooming, decreased attention span, and psychomotor retardation (slowing down of the body). According to some authors, there is a correlation between violence and the limbic system.").

As for the State's witness, an aggravated assault complainant, Radosevich asked on cross-examination only three questions. (6R.R. 14-15). One was, "[S]omething made Lawrence Reed shoot three people, wouldn't you agree with me?" (6R.R. 14). The next one, for which the State's objection was sustained, was, "And you don't know what that something is, do you?" (6R.R. 14). He then elicited that Lawrence had not shot up his family prior to this. (6R.R. 14-15). But of course, Radosevich did not follow up on this information or use it to his advantage.

Finally, Radosevich's grand plan to beg for mercy went as follows:

> There are no analogies. When Hurricane Helene ravaged North Carolina, the whole country is worried about it. It's in the news, what are we going to do? How are we going to help 'em? Wise crack, when we suffered

> duratial [sic] wind in Hurricane Beryl, everybody just said, well, they cheated in the World Series.
>
> You've got two aggravated assaults against a couple of children.[7] The maximum penalty for that is 20 years, and a reasonable amount of a penalty for that. We're going to ask you to assess 20 years. And the credibility, which you are certain judges of, which we've been telling you since voir dire, I'm going to use that to ask for 40 years for killing his wife. That's it. Thank you.

(6R.R. 24-25). This is not representation of a client to whom one owes loyalty—it is an abandonment.

Perhaps once upon a time it was considered "enough" for a defense attorney to stand up and say just the right number of words to evade the shadow of *Cronic*, but courts should not abide this practice. Attorney Radosevich's representation of Lawrence Reed was such a broad and deep failure, it cannot possibly be deemed to have met the bare minimum requirements of representation. Radosevich made himself mere window dressing and gave Lawrence a sham trial at every stage, purporting to stand up and do some lawyering at a few points and ultimately throwing Lawrence under the bus as soon as Lawrence was out of the courtroom. If this is considered constitutionally sound representation, then the right to counsel is the right to nothing. *See Bell*, 535 U.S. at 697 (indicating there can be a deprivation of the right to effective assistance of counsel where defense counsel failed to meaningfully "oppose the prosecution"

[7] This is a misstatement of the evidence. One assault complainant was not a child when this incident occurred—she was twenty years old. (4R.R. 12). Radosevich's exaggeration here reveals his carelessness as well as his disdain for his own client.

through the whole prosecution or a phase of the proceeding, like sentencing); *Martin*, 744 F.2d at 1250-52 (finding ineffective assistance both under *Cronic* and *Strickland*); *United States v. Galinato*, 28 M.J. 1049, 1052-53 (1989).

Even if this Court determines Attorney Radosevich met the bare minimum level of representation prior to closing argument at the guilt/innocence phase, it should hold that Lawrence was constructively denied assistance counsel from the moment he threw Lawrence under the bus at closing through the punishment phase. *See Bell*, 535 U.S. at 697 (2002) (indicating a deprivation of the right to effective assistance of counsel may occur if defense counsel failed to meaningfully "oppose the prosecution" during sentencing); *Upton v. State*, 853 S.W.2d 548, 553 (Tex. Crim. App. 1993) (en banc) (recognizing a defendant is entitled to effective representation at critical phases of trial, so long as there is no valid waiver); *United States v. Ash*, 413 U.S. 300, 313 (1973) (whether a moment or period in a case is "critical" turns on whether "the accused required aid in coping with legal problems or assistance in meeting his adversary").

Radosevich's distaste for his own client throughout this record was palpable, even just on paper, as was his lack of preparedness. As criminal defense attorneys, we have people's lives in our hands. We are often the only person our clients have on their side. Even if we dislike a particular client, we owe them dignity and constitutionally sound representation. And if we cannot meet this already minimal burden, we should not be doing this job. The performance in this case was offensive and if it is sanctioned

by our courts, it will continue to chip away at one of the most foundational rights in our federal and state constitutions.

This Court should reverse all three cases and remand them for a new trial. Alternatively, if this Court determines the ineffective assistance was limited to the punishment phase, it should reverse and remand all three cases for a new punishment trial. *Oliva v. State*, 942 S.W.2d 727, 734–35 (Tex. App.—Houston [14th Dist.] 1997), *rev. dismissed*, 991 S.W.2d 803 (Tex. Crim. App. 1998) (en banc) (per curiam) (reversing for new punishment trial because "the adversarial process broke down at the punishment stage of appellant's trial" where defense counsel did not object to the State's reference to appellant's failure to testify).

Issue II: The trial court erred in denying the request for a jury instruction on the special issue of sudden passion. Alternatively, defense counsel rendered ineffective assistance if this request is deemed unpreserved.

At the punishment phase of trial, Radosevich requested a sudden passion instruction. (6R.R. 20). The State objected due to lack of evidence. (6R.R. 21). Radosevich responded, "And I would argue that . . . we offered an exhibit that is the lack of aural, visual, tangible, written evidence as an exhibit that would allow the consideration of sudden passion to be included in the charge." (6R.R. 21). He was referring to the "evidence" he attempted to admit of Lawrence's absence. The State's case manifested evidence of sudden passion (discussed more at length *infra*), though Radosevich failed to mention this. The trial court denied the defense's request for a

sudden passion instruction "[b]ased upon the evidence that the Court has heard and based on the requirements to admit sudden passion. . . ." (6R.R. 22). Defense counsel then objected to the removal of the sudden passion issue, but it was ultimately removed. (6R.R. 23).

A. Applicable Law and Standard of Review

When a defendant is convicted of murder, a first-degree felony, the sentencing range may be demoted to that of a second-degree felony if "he caused the death under the immediate influence of sudden passion arising from an adequate cause." TEX. PENAL CODE § 19.02(d). "Sudden passion" is defined as "directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation." *Id.* at (a)(2). "'Adequate cause' means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." *Id.* at (a)(1).

Whether the defendant acted in sudden passion must be proven by the defense by a preponderance of the evidence. *Trevino v. State*, 100 S.W.3d 232, 237 (Tex. Crim. App. 2003) (en banc). A trial court must include a sudden passion instruction in the jury charge at punishment "if there is some evidence to support it, even if that evidence is weak, impeached, contradicted, or unbelievable." *Id.* at 238. Evidence on this issue "will

often come out in the course of the State's own evidence of the circumstances of the offense itself. . . ." *Ibid.*

"An appellate court's duty is to look at the evidence supporting the charge of sudden passion, not the evidence refuting it." *Beltran v. State*, 472 S.W.3d 283, 294 (Tex. Crim. App. 2015) (holding the Court of Appeals erred in failing to find error in the omission of the sudden passion charge and remanding for a harm determination).

B. Analysis

Lawrence was entitled to a sudden passion instruction because the State's case itself showed at least some evidence that he acted under "the immediate influence of sudden passion arising from an adequate cause." Lawrence's wife wanted to leave him, and he knew it. (4R.R. 17). Lawrence had a stroke the year they got married (in 2017). (4R.R. 27, 37). After that, it appears there were some behavioral changes. His wife was not comfortable with him anymore and she and their kids went on a trip to Chicago. (4R.R. 41-42). When they returned, Lawrence's wife did not want to be around him and stayed away from their shared home that first night. (4R.R. 42-44). She had a couple of her kids go remove a firearm from their shared home. (4R.R. 44-46). She and all the kids then returned to that home where Lawrence was. (4R.R. 51-52). While the kids hung out downstairs, Lawrence did not feel well, and he spent hours begging for his wife to come see him upstairs because he had something for her. (4R.R. 187). He had written her cards and letters about how much he loved her. (4R.R. 193-94).

Lawrence finally came downstairs and begged her to read them, and she consistently denied him. (4R.R. 23, 54-59). Then, the oldest daughter (one of the aggravated assault complainants) attempted to intervene because she realized Lawrence had a gun on him; in his desperation to reconnect with his wife to avoid losing her, and with the scene getting more chaotic, the evidence showed Lawrence suddenly began shooting. (4R.R. 59). His rage and resentment, which had clearly been building up, boiled over the top at this interaction. There did not appear from the evidence to be a period allowing cool reflection. *Id.* The evidence suggested sudden passion on a theory of rage and resentment.

In *Trevino*, the Court of Criminal Appeals held the Appellant was entitled to a sudden passion instruction because some evidence would have supported such a finding. That evidence included that Trevino and the complainant had a "verbal altercation" and then got into a firearm battle, that Trevino was upset and crying in the aftermath in distress. *Trevino*, 100 S.W.3d at 239. The Court held this evidence, though "weak and . . . arguably . . . impeached by the State's evidence" was enough to require a charge on sudden passion. *Ibid.* If it was error to omit a sudden passion instruction simply because there was an argument and struggle over a firearm, then it is error to omit the same instruction here.

C. Harm

"[W]hen a defendant properly objected to the charge, the applicable statutory standard is whether 'the error appearing from the record was calculated to injure the rights of the defendant,' or in other words, whether there was 'some harm.'" *Trevino*, 100 S.W.3d at 242 (quoting TEX. CODE CRIM. PRO. art. 36.19; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc)). Under *Almanza*, a reviewing court must determine harm by assessing "the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Almanza*, 686 S.W.2d at 171. Defense counsel, though imperfectly, requested the sudden passion instruction.

In *Trevino*, the parties' theories were contradictory: the "State argued that Trevino shot Michelle in cold blood and staged the crime scene" to resemble self-defense "while the defense argued that Trevino and Michelle struggled and he shot her in self-defense." *Trevino*, 100 S.W.3d at 242. The Court held the Court of Appeals did not err in finding some harm in the omission of the sudden passion instruction because the jury could have found sudden passion without rejecting the State's theory of guilt. *Ibid.* It was possible Trevino acted in sudden passion and then tried to cover it up by "staging" the scene; "[t]he jury was entitled to consider this scenario." *Ibid.* The Court of Criminal Appeals affirmed the Court of Appeals's reversal of the sentence because it could not

"say with 'fair assurance' that the error did not have an 'injurious effect or influence in determining the jury's verdict.'" *Id.* at 243.

Here, there was at least some harm in the punishment phase of trial due to the omission of the sudden passion charge. As discussed above, the State's case in chief provided evidence that Lawrence's wife was going to leave him, and he was desperately trying to save the marriage. After his stroke, it appears there were some behavioral changes. When his wife returned from a trip, Lawrence made efforts to get her to listen to his pleas for her to stay in the relationship—he spent hours begging her to read his cards and letters about how much he loved her. She refused, and when someone attempted to intervene Lawrence appeared to snap and began shooting. This pointed to sudden passion on a theory of rage and resentment. *See Beltran v. State*, No. 05-12-01647, 2016 WL 3749707, *4-5 (Tex. App.—Dallas, Jul. 7, 2016, pet. ref'd) (mem. op. on remand) (not designated for publication).

As for arguments of counsel, neither attorney addressed sudden passion to the jury as there was no such instruction. Defense counsel entirely threw Lawrence under the bus and argued no mitigation whatsoever, offering only incoherent references to hurricanes and the World Series and then a suggestion for forty years "for killing his wife" but with no reasoning. (6R.R. 24-25). The jury then handed Lawrence a life sentence and the maximum of twenty years for each of the assaults.

This case is well within the sphere of *Trevino* and *Beltran*, which both resulted in new punishment trials despite the courts having indicated the sudden passion evidence

was weak or contradicted. The bar for "some harm" when there is error in the omission of a sudden passion instruction is not high: the *Beltran* court found that case was "similar to *Trevino*" and found some harm because "a likelihood exist[ed] the jury would have believed Beltran acted out of sudden passion had it been given the instruction." *Beltran*, 2016 WL at *7 (explaining also that the instruction allowing the jury to consider all evidence "did not ameliorate the omission of the sudden passion instruction," nor did defense counsel's request for mercy). And here, the sudden passion evidence itself, despite being somewhat contradicted, was not weak—Lawrence's sorrow and passion were evident. Therefore, the error in omitting the sudden passion instruction here caused some harm to Lawrence and the jury could have found sudden passion if correctly charged. This Court should vacate Lawrence's life sentence and remand the murder case for a new punishment trial.

D. Ineffective Assistance of Counsel if Request Unpreserved

If this Court determines Radosevich failed to properly preserve the sudden passion instruction issue, then he was ineffective in that failure. U.S. CONST. amend. VI; TEX. CONST. art I, § 10. To prevail on a claim of ineffective assistance of counsel under the *Strickland* standard, the defendant must show that (1) counsel's performance was deficient and (2) a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The first prong of Strickland requires the defendant to prove objectively, by a preponderance of the evidence, that his counsel's representation fell below professional standards. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). The performance prong asks whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. It "is necessarily linked to the practice and expectations of the legal community"—that is, whether the attorney's action or inaction was reasonable "under prevailing professional norms." *Hinton v. Alabama*, 571 U.S. 263, 273 (2014), quoting *Strickland*, 466 U.S. at 688; *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). Generally, courts ask whether an action or failure could be attributed to a reasonable strategic decision and whether there is record of an attorney's explanation for the action or failure. *Strickland*, 466 U.S. at 689. Courts lend considerable deference to such possible strategic choices. *Id.*

The "prejudice" prong "requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 668. A court can find the result of a trial unreliable due to counsel's errors "even if [they] cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. The standard, rather, is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To show prejudice in a claim of ineffective assistance based on a

failure to object (or properly preserve a request or objection), one must show the trial court "would have committed error in overruling such an objection." *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) (en banc).

Generally, "a direct appeal proves an inadequate vehicle for raising an ineffective assistance claim" because often, the cold record is not developed to "reflect the motives behind trial counsel's actions." *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999). A court will not find deficient performance unless the challenged conduct is "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *see also Andrews v. State*, 159 S.W.3d 98, 102-03 (Tex. Crim. App. 2005) (finding deficient performance on direct appeal when counsel failed to object to the State's detrimental misstatement of the law despite not being able to ascertain counsel's subjective motivation for failing to do so because there was no conceivable reason for the failure to object).

Here, if this Court determines Radosevich failed to preserve his request for the sudden passion instruction, it is obvious from the cold record that it was not a strategic decision. Radosevich was clear that his entire strategy for the case (and with no mitigation backup plan) was to make a case for sudden passion—he stated this to the trial court multiple times from early on and requested the instruction. (2R.R. 10, 102; 3R.R. 24, 41, 171; 5R.R. 14, 33-34; 6R.R. 6-7, 16-21). If he failed to preserve the sudden

passion issue, it was not strategy because the sudden passion theory was his entire strategy.

There was prejudice here because it was (or would have been) error for the trial court to deny the request for a sudden passion instruction. The argument that this is/would have been error is fully briefed in sections A-C of this issue and is incorporated by reference here, including the harm analysis. *Supra*, pp. 22-28.

Therefore, even if this Court determines Radosevich failed to preserve the request for a sudden passion instruction, it should reverse and remand the murder case for a new punishment hearing due to ineffective assistance of counsel.

PRAYER

Appellant, Lawrence Reed, prays that this Court reverse the lower court's judgment and remand this case for a new trial on all three cases. Alternatively, this Court should reverse and remand for a new punishment trial. Mr. Reed also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

Alexander Bunin
Chief Public Defender
Harris County Texas

/s/ Sophie Bossart
Sophie Bossart
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 24129374
1310 Prairie St., 13th floor
Houston, Texas 77002
Phone: (713) 368-7098
Fax: (713) 368-9278
sophie.bossart@pdo.hctx.net

CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served to the Harris County District Attorney's Office on April 10th, 2025.

/s/ Sophie Bossart
Sophie Bossart
Appellant's Counsel

CERTIFICATE OF COMPLIANCE

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/s/ Sophie Bossart
Sophie Bossart
Appellant's Counsel

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Ashley Davila on behalf of Sophie Bossart
Bar No. 24129374
Ashley.Davila@pdo.hctx.net
Envelope ID: 99522113
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Caird	24000608	caird_jessica@dao.hctx.net	4/10/2025 2:13:12 PM	SENT
Sophie Bossart	24129374	sophie.bossart@pdo.hctx.net	4/10/2025 2:13:12 PM	SENT