NO. 01-24-00359-CR

IN THE COURT OF APPEALS

FOR THE

FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS



REBBA CARYN STUARTAPPELLANT

VS.

THE STATE OF TEXAS

APPELLEE

ON APPEAL

CAUSE NO 95748-CR

FROM THE 412TH JUDICIAL DISTRICT COURT

BRAZORIA COUNTY, TEXAS

HONORABLE JUSTIN R. GILBERT, JUDGE PRESIDING

# BRIEF FOR APPELLANT

PERRY STEVENS

ATTORNEY AT LAW

P.O. BOX 17

ANGLETON, TEXAS 77516-0017

perrystevens14@gmail.com

TEL. (979) 848-1111

ATTORNEY FOR APPELLANT

## NAMES OF ALL PARTIES

Rebba Caryn Stuart– Appellant
TDCJ # 02506956
Hobby Unit
742 FM 712
Marlin, TX 76661-4685

Perry Stevens
Attorney on Appeal for Appellant
Texas State Bar# 00797496
P.O. Box 17
Angleton, TX 77516
perrystevens14@gmail.com
979-848-1111

Lindsay Lopez
Trial Attorney for Appellant
Texas State Bar # 24062859
14150 Huffmeister Road,
Suite 200-113
Cypress, Texas 77429

David Smith
Trial Attorney for Appellant
Texas State Bar # 24044359
11200 Broadway, Suite 2743
Pearland, Texas 77548

State of Texas – Appellee
Tom Selleck
Criminal District Attorney
111 East Locust, Room 408A
Angleton, Texas 77515

Travis Townsend
Trial Attorney for the State of Texas
Texas State Bar #24048843
Brazoria County District Attorney's Office
111 East Locust, Suite 408A
Angleton, Texas 77515

David Rogers
Trial Attorney for the State of Texas
Texas State Bar #24095330
Brazoria County District Attorney's Office
111 East Locust, Suite 408A
Angleton, Texas 77515

## SUBJECT INDEX

SUBJECT INDEX CONTINUED

## LIST OF AUTHORITIES

CASE PAGE

## LIST OF AUTHORITIES CONTINUED

CASE PAGE

## LIST OF AUTHORITIES CONTINUED

## STATEMENT OF THE ISSUES

### POINT OF ERROR ONE

THE TRAIL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO EXHIBITS AND TESTIMONY BECAUSE THE STATE FAILED TO SHOW THE EVIDENCE WAS COLLECTED PURSUANT TO A VALID SEARCH WARRANT BASED ON PROBABLE CAUSE

### POINT OF ERROR TWO

THE TRIAL COURT ERRED BY DENYING APPELLANT THE RIGHT TO MAKE OFFERS OF PROOF REGARDING EXCLUDED EVIDENCE.

### POINT OF ERROR THREE

THE STATE FAILED TO PROVIDE THE PREDICATE FOR THE INTRODUCTION OF FACEBOOK POST

### POINT OF ERROR FOUR

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT A RIGHT TO PRESENT A COMPLETE DEFENSE

### POINT OF ERROR FIVE

THE TRIAL COURT ERRED IN ORDERRING FEES TO BE REPAID BY THE APPELLANT

## STATEMENT OF THE CASE

This is a direct appeal from a conviction for Injury to Elderly. Appellant was charged by indictment for Injury to Elderly under Tex. Pen. Code Sec. 22.04 (a) (1), on June 16, 2022. (C.R. at 7). Appellant entered a plea of not guilty on April 23, 2024. (II R.R. at 6). The jury returned a verdict of guilty on May 1, 2024. (VII R.R. at 77).

Aggravated Assault, under Tex. Pen. Code Sec. 22.04 (e) is a 1st degree felony offense with a range of punishment of not more than 99 years or less than 5 years or life within the Texas Department of Criminal Justice – Institutional Division and a fine not to exceed $10,000.00.

Following evidence and arguments on the issue of punishment, the jury accessed punishment at 30 years in the Texas Department of Criminal Justice-Institutional Division and a $10,000.00 fine. (IIX R.R. at 158).

NO. 01-24-00359-CR

IN THE COURT OF APPEALS

FOR THE

FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

REBBA CARYN STUARTAPPELLANT

VS.

THE STATE OF TEXAS

APPELLEE

ON APPEAL

CAUSE NO 95748-CR

FROM THE 412TH JUDICIAL DISTRICT COURT

BRAZORIA COUNTY, TEXAS

HONORABLE JUSTIN R. GILBERT, JUDGE PRESIDING

# BRIEF FOR APPELLANT

TO THE COURT OF APPEALS:

COMES NOW, Rebba Caryn Stuart, appellant herein, and files this her brief in this cause. This is an appeal from the 412th Judicial District Court, Brazoria County, Texas.

## STATEMENT OF THE FACTS

The State indicted Appellant on June 16, 2022. (C.R. at 7). The State Alleged Appellant committed an offense under the TEX. PEN. CODE Sec. 22.04 (a) (1), Injury to Elderly. (C.R. at 7). The indictment alleged Appellant did then and there intentionally or knowingly cause serious bodily injury to Florida Brown, an individual sixty-five (65) years of age or older, by causing a motor vehicle operated by the defendant to collide with a vehicle occupied by Florida Brown. TEX. PEN. CODE sec. 22.04 (e), stipulates the offense as alleged is a first-degree felony offense with a range of punishment of not more than 99 years or less than 5 years or life, within the Texas Department of Criminal Justice – Institutional Division and a fine not to exceed $10,000.00. To the indictment, Appellant plead not guilty on April 24, 2024. (III R.R. at 27).

The testimony asserted by the State is that Appellant while driving her vehicle attempted to commit suicide by driving through an intersection and colliding with a vehicle driven by Florida Brown. The State presented Susanna Frost, Jack Frost, Gersain Rios, Chadwick Menefee, Tanya Norris, Andrew McReynolds, Keith Woods, Shawan Carr, Chad O'Neil, James Staton, Dr. Brian Cotton, Kenneth Taylor, Dayde Foley, and rebuttal testimony from Stephen Simoneau.

Susanna Frost testified that on March 21st of 2022 she traveled to Angleton, Texas for the purpose of grocery shopping. (III R.R. at 37). After shopping she was returning home some time after 10:00 in the morning. (III R.R. at 38). While stopped in the turn lane of F.M. 521 waiting to turn onto F.M. 1462, due to a red light, Ms. Frost witnessed the accident Appellant was accused of causing. (III R.R. at 38-39). Ms. Frost was unable to identify Appellant. (III R.R. at 49). Ms. Frost testified she witnessed the vehicle driven by Appellant collide with the vehicle driven by Florida Brown. (III R.R. at 51).

Jack Frost, husband of Susanna Frost, traveling with his wife testified to the accident involving Appellant and Ms. Brown. Mr. Frost testified he witnessed the vehicle traveling from the west enter the intersection traveling east. The vehicle traveling from the north entered the intersection without attempting to stop and collided with the vehicle traveling from the west. (III R.R. at 55).

Gersain Rios ‘s testimony supported the testimony of Mr. and Ms. Frost as to which vehicle struct the vehicle driven by Ms. Brown. (III R.R. at 75). Mr. Rios testified the vehicle that was struck, Ms. Brown, was traveling west and her light was yellow as she entered the intersection. (III R.R. at 75). Mr. Rios was able to

determine Ms. Brown's traffic control light was yellow because he was traveling in the same direction as Ms. Brown. (III R.R. at 79).

Trooper Chadwick Menefee with the Texas Highway Patrol testified to his involvement with the accident investigation. (III R.R. at 86). Trooper Menefee testified the silver Audi, driven by Appellant, was responsible for the crash. (III R.R. at 88-89). Trooper Menefee testified the driver of the vehicle struck by the Audi, Ms. Florida Brown was driving an Infiniti. (III R.R. at 91). Upon a determination the accident may have been due to an intentional act and the investigation was turned over to the Brazoria County Sheriff's Department. (III R.R. at 92). Trooper Menefee was requested to view the security video of an adjacent gas station located at the intersection of F.M. 521 and F.M. 1462. The security video showed the silver Infiniti that was traveling east on FM 1462 approaching the intersection on the green light and that she had the right-of-way. It showed the silver Audi that was traveling south on FM 521 approaching that intersection disregarded the traffic control signal and struck the silver Infiniti on the driver's side. (III R.R. at 97). In addition to reviewing the security video, Trooper Menefee took pictures of the accident scene and obtained witness statements. (III R.R. at 106). Trooper Menefee attempted to speak with Appellant, and he testified she appeared to be confused and was unable to answer his questions. (III R.R. at 108).

Tany Norris, niece of Florida Brown, testified to the age of Ms. Brown, (III R.R. at 115), where she was from, (III R.R. at 116), the purpose of her visit to the area, (III R.R. at 118), and a photo of Ms. Brown before the accident. (III R.R. at 123).

Deputy Andrew McReynolds testified he is a patrol deputy with the Brazoria County Sheriff's Office. (III R.R. at 126). The deputy made contact at the vehicle, the Audi, with Rebba Stuart. (III R.R. at 127). The deputy asked if she had any injuries. She advised or the deputy observed the left side of her body to be injured. When the deputy asked her why or what happened, she stated she was trying to kill herself and caused the incident. (III R.R. at 129). The deputy asked her why she was trying to kill herself and she did not respond. (III R.R. at 130). On cross Deputy McReynolds testified he recognized the Appellant was in server pain. When he first approached, he attempted to obtain her information. To this the Appellant was not responding. (III R.R. at 140). His questions to Appellant are recorded on his body camera. The body camera footage verified Appellant is conscious and moving but nonresponsive to his questions. (III R.R. at 141). The deputy is heard asking Appellant what happened. Appellant's response is not captured by the recording. The only voice recorded by the body camera is the deputy clarifying Appellant told him she caused the accident because she was trying to kill herself. The defense questions why his testimony conflicts with his written report in that the report does not state the cause

of the accident. (III R.R. at 142). To this the deputy clarifies Appellant said she was trying to commit suicide, not that she caused the accident because she was trying to kill herself. (III R.R. at 143). Deputy McReynolds did not ascertain who had a red or green light, (III R.R. at 149), and did not observe skid marks. (III R.R. at 153).

Keith Woods, an automotive mechanic for the past 42 years, testified to his inspection of the vehicles involved in the accident. (III R.R. at 159). Following a hearing under Texas Rules of Evidence 702 the trial court overruled the defense objection and allowed the State to present the testimony of Mr. Woods. (III R.R. at 168). Mr. Woods testified he has been a mechanic for 25 years, certified with an ASE certification, which is Automotive Service Excellence. (III R.R. at 170). In conducting crash investigations, he looks for the condition of the mechanicals involved with the vehicle as far as brakes, steering, and conditions of various items such as the wiper blades to determine if they were functioning at the time of the accident. (III R.R. at 171). He testified the Audi, driven by Appellant, was controllable before the accident. (III R.R. at 174). He additionally testified the Infiniti, driven by Florida Brown, was controllable before the accident. (III R.R. at 175).

Shawn Carr testified she works at Memorial Hermann Hospital as a psychiatric nurse practitioner. (IV R.R. at 36). As a psychiatric nurse practitioner in the

emergency department, she evaluates people with acute psychiatric emergency conditions. (IV R.R. at 37). Ms. Carr testified she was requested to evaluate Appellant due to her statement she intentionally collided with the vehicle. This, she testified, indicated Appellant may have been suicidal at the time of the crash and that she was indeed trying to kill herself. (IV R.R. at 50). The evaluation of Appellant by Ms. Carr was conducted on March 22nd, 2022. (IV R.R. at 51). Ms. Carr reported Appellant was alert, oriented, calm, cooperative, and clear of thought. Ms. Carr reported Appellant was a bit evasive when it came to questions specifically about suicidal thinking. As opposed to answering those questions Appellant would deflect to other subjects. Appellant did mention that she made some social media posts, but she would not go into detail about those posts. Appellant did report she tried to contract with her brother to kill her at 7 years old. (IV R.R. at 52). Appellant advised of a recent break-up and abortion in January 2022. Appellant advised her ex consensually raped her. When Ms. Carr asked her what she meant, Appellant told her the boyfriend took the condom off, even though she expressly said not to, and that resulted in a pregnancy. (IV R.R. at 53). Ms. Carr spoke with Appellant's mother and stepfather to gain some insight into the patient's mental state before and maybe even during an episode of a possible acute psychiatric episode. (IV R.R. at 53). The family advised Appellant had an abortion in January. They thought that

was significant because it had a bearing on Appellant's mental and emotional status at the time. It was reported Appellant had been staying up all night, not being able to sleep, and crying. Appellant had been verbally aggressive at times but never physically aggressive with the family. The parents reported Appellants' alcohol consumption had increased significantly. This was notable to Ms. Carr because Appellant had reported she had not been drinking. (IV R.R. at 54). Ms. Carr did note no delusional thinking or hallucinations. Appellant reported that she was feeling okay, and she did not appear to Ms. Carr to be depressed or anxious. (IV R.R. at 55). Appellant self-reported a history of depression, PTSD, Borderline Personality Disorder, and acknowledged suicidal thoughts. (IV R.R. at 59). Appellant did advise she had no intention of harming anyone. (IV R.R. at 60). Ms. Carr testified Appellant was involuntary discharged to a psychiatric hospital. (IV R.R. at 66).

The State called Dr. Bryan Cotton a trauma surgeon, with the University of Texas Health Science Center in Houston and Memorial Hermann Hospital to testify. (VI R.R. at 12). Dr. Cotton, referring to the medical records, testified to the injuries suffered by Florida Brown, the procedures and care she received in the hospital, and her death after being transferred to the ICU. (VI R.R. at 14-27). Dr. Cotton testified the injuries constituted serious bodily injury. (VI R.R. at 27). Dr. Cotton continued

his testimony from the medical records of Appellant, testifying to the injuries she suffered. (VI R.R. at 30-32).

Kenneth Taylor, with the Brazoria County Sheriff's Department at the time of the accident as commercial motor vehicle enforcement as well as a traffic and/or crash investigation testified as to his responsibilities during the investigation. (VI R.R. at 35). Taylor collected evidence from both vehicles EDR modules and the infotainment systems. The analysis of these systems provided an understanding of the vehicles' actions prior to the accident. (VI R.R. at 37).

Dayde Foley employed with the Brazoria County District Attorney's Office as a felony secretary, (VI R.R. at 46), testified she was requested to review Appellant's Facebook post. (VI R.R. at 47). Ms. Foley testified to the contents or statements of five posts found on Appellant's Facebook page from March 12, 2022, to June 17, 2022. (VI R.R. at 65-66).

The State presented rebuttal testimony from Stephen Simoneau with the Brazoria County Sheriff's Office mental health division. (VII R.R. at 17). Officer Simoneau was responsible for serving a mental health warrant on Appellant. (VII R.R. at 19). The warrant required Simoneau to transport Appellant from Memorial Herman Hospital to SUN Behavioral a psychiatric facility. (VII R.R. at 20).

The defense presented three witnesses, Dr. Daniel Osborn, April Powers, and Robin Wright. The testimony provided by the defense rebutted the evidence of the State's allegations of Appellant's mental health history, accident investigation, and the medical condition of Appellant at the scene of the crash.

Dr. Daniel Osborn, a licensed psychologist with the State of Texas with a specialty in forensics, (VI R.R. at 75), testified he works with six counties in Texas providing competency and sanity evaluations. (VI R.R. at 77). Dr. Osborn received a referral from Brazoria County to conduct a competency evaluation on Appellant. Dr. Osborn was provided with Appellant's jail records. (VI R.R. at 85). The medical records indicated Appellant denied any mental health issues, history of suicidal attempts, or having a history of mental health treatment. During his evaluation of Appellant, in April of 2023, (VI R.R. at 87), she reported never having been diagnosed or suffering from any mental health symptoms. The records indicated Appellant was offered an antidepressant which she refused. Dr. Osborn testified he reached the conclusion that Appellant did not meet the criteria for having a mental health disorder. (VI R.R. at 86). Following this initial examination, Dr. Osborn did not believe that Appellant had a diagnosable mental health disorder. (VI R.R. at 88). Following the initial competency evaluation, Dr. Osborn was asked to reevaluate Appellant. As part of this evaluation, he was provided with additional medical

reports and records of additional evaluations. Dr. Osborn, with the additional information learned Appellant had received several diagnoses at Hermann Memorial and an additional diagnosis at HCPC. The appellant was previously diagnosed with PTSD, Bipolar, Borderline Personality Disorder, Adjustment Disorder with depressed mood. (VI R.R. at 90). Dr. Osborn testified his first evaluation is not reliable in consideration of the updated information he was provided as to her history. He recognized Appellant had been seen by several different providers, providing different opinions of her, diagnoses. Dr. Osborn testified the records indicated all the diagnoses, including his first evaluation, were being made from records and self-reports. The doctor believed a psychopathology test to determine if she did actually exhibit any traits for a particular disorder was required to aid in his evaluation. (VI R.R. at 99). When questioned if a person of suicidal tendency would hide the information, Dr. Osborn testified people who have been suicidal will indicate that they have been suicidal. There is no reason to hide the information. That in most situations providing information does not go against or for them. (VI R.R. at 104). Appellant scores were within acceptable limits. The doctor testified she approached the test in an open and honest manner. She evidenced no significant scores to suggest that she has a mental health disorder. (VI R.R. at 104). The most significant testimony by Dr. Osborn is that the diagnosis of Memorial Herman

Hospital was a misdiagnosis. The diagnosis of Memorial Herman would not be resolved without treatment and a significant amount of time. (VI R.R. at 105).

April Powers, a part-time paramedic with Angleton Emergency Medical Corp., testified for the defense. (VI R.R. at 147). Ms. Powers testified she and her partner where dispatched to the accident. Upon arrival she made contact with Appellant. (VI R.R. at 152). She testified Appellant had injuries to her face from the air bag indicated by the blood to her face. The appellant was not suffering from any long bone injuries, but did have what Ms. Powers assessed as a closed head injury. Additionally, Appellant was not making sense, she had what Ms. Powers wrote in her report that appellant had an altered mental state. (VI R.R. at 154). Ms. Powers reported the appellant had what is referred to as a GS-11 based on the Glasgow Coma Scale. Ms. Powers provided a person typically has a scale of GS-15 and an individual with no eye movement response would have a GS-3. A GS-11 identifies someone who is only responsive to pain. (VI R.R. at 155). It was noted Appellant was alert and oriented at times. Appellant was able to provide her name but wasn't able to provide any additional information. Ms. Powers reported appellant was confused and mostly moaning with some abrasions to the anterior of the front of her face from the air bag and an abrasion to the neck. In assessing her breath sounds they were clear and normal. The appellants' abdomen was soft and normal,

however her left lower extremity was tender. with some swelling and abrasion. The medical team believed this was a possible fracture. The main concern was the possibility of a closed head injury, considered a major trauma with bleeding into her brain. (VI R.R. at 156). While enroute to the hospital Appellant's GS rate dropped to a GS-9 and her heart rate was 150. Ms. Powers testified this is indicative of a shock state. (VI R.R. at 158).

Robin Wright testified he is an accident reconstructionist. (VI R.R. at 169). Mr. Wright analyzed the electronic control module downloads. (VI R.R. at 173). Using the data on how fast the vehicles were going, Mr. Wright, when investigating the location of the accident, was able to place the vehicles where they were at various times within five seconds pre-impact. This information allowed him to understand the field of view available for the drivers. (VI R.R. at 174). Using the pre-crash data, he can determine the speed of the vehicle, the accelerator pedal position, and whether the service brake activation is on or off. The post-crash data analyzed included the change in velocity sensed by the module, both longitudinally and laterally. (VI R.R. at 178). Mr. Wright noted Appellant's visibility of the Cross-street traffic was limited due to brush, trees, and two large signs on the shoulder of the road as she approached the intersection. (VI R.R. at 179). With this information and the crash data, Mr. Wright calculated that Ms. Flowers would not have entered

the appellant's field of view until Appellant was 131.94 feet from the intersection. The pre-crash data indicates the brake system was off for the entire five seconds of the record and the accelerator pedal position indicated zero percent, which means that it was not being pressed. (VI R.R. at 180). This information indicates the speed of the vehicle was most likely maintained by cruise control. (VI R.R. at 181). Mr. Wright testified there is a generally accepted response time for an individual attempting to avoid an accident of 2 to 2.5 seconds. (VI R.R. at 182). Factors involved in determining reaction time can include Visibility, cell phone usage, was the driver in the process of tuning the radio, or if they were sending or receiving a text. This information is especially important if you have no obvious reaction time when the data provides that there was no braking prior to impact. Mr. Wright testified with the available information, Appellant would have had only 1.5 seconds to react in attempt to avoid the accident. Thus, less than the 2 to 2.5 seconds required. (VI R.R. at 184). On the cross-examination Mr. Wright testified the traffic control light would have been visible from 449.8 feet from the intersection. (VI R.R. at 194).

## POINT OF ERROR ONE

## THE TRAIL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO EXHIBITS AND TESTIMONY BECAUSE THE STATE FAILED TO SHOW THE EVIDENCE WAS COLLECTED PURSUANT TO A VALID SEARCH WARRANT BASED ON PROBABLE CAUSE

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures by requiring police officers to first obtain a warrant based on probable cause before conducting a search or seizure. U.S. CONST. amend. IV; *see also* TEX. CONST. art. I, § 9 (requiring a warrant describing probable cause to search any place or seize any person or thing). The State failed to establish the evidence obtained by Detective Chad O'Neil, through the event data recorder from Appellant's vehicle and his subsequent testimony of this information and a report generated by Detective James Staton, from the information collected by Detective O'Neil was obtained with a valid search warrant or the good faith belief a valid search warrant existed.

Defense counsel objected to evidence, State's Exhibits 13, 14, 15, and 16 were collected without showing the evidence was collected with a valid search warrant from the vehicles involved in the investigation and in violation of the TEX. CODE OF CRIM. PRO. Art. 38.23. and Article 1 Section 10 of the Texas Constitution. To this the trial court overruled the objections and the exhibits were introduced.

Appellant objected to Detective O'Neil's testimony of the evidence he collected from Appellant's vehicle and State's exhibits 13 and 14, the evidence was collected without legal authority. Following the trial court overruling the objection Detective O'Neil testified, in response to the question if he was aware a search warrant had been obtained by someone other than himself, "Yes, I was told that they did." (IV R.R. at 126). This single statement fails to meet the qualifications of a good faith belief a valid search warrant was obtained, and Detective O'Neil could collect the evidence.

TEX. CODE OF CRIM. PRO. Art. 38.23. (a) establishes:

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

Under TEX. CODE OF CRIM. PRO. Art. 38.23. (b) provides: "It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause."

> "It is plain enough from the language of Article 38.23(b) that, before its good-faith exception to Subsection (a)'s exclusionary rule may apply, there must be (1) objective good-faith reliance upon (2) a warrant (3) issued by a neutral magistrate that is (4) based upon probable cause. With respect to the fourth requirement, we long ago declared that "[t]he plain wording of Art[icle] 38.23(b) requires an initial

> determination of probable cause." *Curry v. State,* 808 S.W.2d 481, 482 (Tex. Crim. App. 1991) (citing *Gordon v. State,* 801 S.W.2d 899, 912-13 (Tex. Crim. App. 1990)); *see also* George E. Dix & John M. Schmolesky, 40 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 7.67, at 395 (3d ed. 2011) ("If probable cause is found to be lacking, Article 38.23 — although not federal constitutional considerations — requires that the evidence be excluded regardless of whether the officer relying on the warrant believed that it had been issued on facts sufficient for probable cause.").”

*McClintock v. State,* 541 S.W.3d 63, 67 (Tex. Crim. App. 2017).

An Officer’s statement he was told there was a search warrant fails to establish the search warrant is facially valid. This single statement fails to establish a warrant was issued based on an initial determination of probable cause by a neutral magistrate. *McClintock*, 541 S.W.3d at 67. To show Detective O'Neil acted in good faith the State must show the search warrant is valid. To show the search warrant is valid the State must provide evidence the warrant is based on probable cause. Probable cause for the establishment of a warrant requires an affidavit that alleges specific facts showing a connection between the criminal activity, the things to be seized, and the place to be searched. “Probable cause exists when, looking at the ‘totality of the circumstances’ stated in a sworn affidavit supporting an application for a search warrant, there is a ‘fair probability’ that evidence of a crime will be found at a particular location.” Glover v. State, 695 SW 3d 829, 832 (Tex.App.- Houston [1" Dist.] 2024). To show probable cause the affidavit must provide sufficient

information to the magistrate to allow that official to determine probable cause. “his action cannot be a mere ratification of the bare conclusions of others." *State v. Baldwin,* 664 S.W.3d 122, 130 (Tex. Crim. App. 2022) (quoting *Gates,* 462 U.S. at 239, 103 S.Ct. 2317).

Following Detective O’Neil’s testimony, Jason Staton, formally a detective with the Pearland Police Department testified to removing a SD card from Appellant’s vehicle. (IV R.R. at 160). With the SD card Staton was able to generate a report of Appellant’s vehicle crash data records. (IV R.R. at 161). During Staton’s testimony the State failed to show the evidence/report he generated was based on information properly collected under the authority of a valid search warrant. Staton was not questioned on his relance of a search warrant. Thus, there is no showing Staton was under a belief the information he relied on was obtained lawfully.

Subsequent to Detective O'Neil’s and James Staton’s testimony on the last day of the State’s case in chief, the State introduced the search warrant as a government record over the objection of defense counsel. Defense counsel objected the probable cause affidavit was hearsay and additionally the introduction of the warrant violated Appellant’s 4th, 6th, and 14th Amendment rights. (VI R.R. at 38). The trial courts response, “Just put the search warrant in, not the affidavit. Remark 18 and reoffer 18. That's what we're going to do.” (VI R.R. at 38).

The principal of the Fourth Amendment's and its Texas equivalent is that a magistrate may not issue a search warrant without first finding "probable cause" that a particular item will be found in a particular location." *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex.Crim. App.2007); U.S. Const. amend IV. Tex. Const. art. 1, & 9. The test is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a "substantial basis" for issuing the warrant. *Massachusetts v. Upton*, 466 U.S. 727, 733, 104 S.Ct. 2085, 2087, 80 L.Ed.2d 721, 726 (1984). Probable cause exists when, under the totality of the circumstances, there is a "fair probability" that contraband will be found at the specified location. *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Gates,* 462 U.S. at 239, 103 S.Ct. 2317*; State v. Duarte*, 389 S.W.3d 349,354 (Tex.Crim. Ãpp.2012). An appellate court must read the affidavit in a common sense, realistic manner, recognizing that the magistrate may draw reasonable inferences and deferring to all reasonable inferences that a magistrate could have made. *Foreman v. State,* 613 S.W.3d 160, 164 (Tex.Crim.App. 2020).

The fault in the trial court's ruling, to admit the search warrant without the affidavit, is that the record fails to support the validity of the search warrant. There is no showing the trial court considered the affidavit or found the affidavit sufficiently established probable cause. Without the affidavit or the testimony of the affiant as requested by the defense counsel, there is no probable cause to support the validity of the search warrant. There is no affidavit to review, and no determination is available to judge if the magistrate drew reasonable inferences in finding probable cause existed in issuing the search warrant.

In all criminal prosecutions, the accused shall enjoy the right to be confronted by the witnesses against him. U.S. Const. amend VI.; TEX. CONST. art. 10. The primary right secured by the Sixth Amendment is the right of cross examination. *Lopez v. State*, 18 S.W.3d 220, 222 (Tex.Crim.App. 2000). The trial court denied the right of Appellant to confront the affiant and allowed the jury to accept the warrant as valid without showing probable cause existed for the search. The jury was led to believe the search was validated simply by the existence of a search warrant alone.

The introduction of the search warrant without the supportive affidavit fails to establish the warrant is "facially valid". *McClintock*, 541 S.W.3d at 73. The State's failure to introduce the search warrant with the supportive affidavit fails to support the search warrant is valid and thus fails to support Detective O'Neil relied in good

faith that his search of Appellant's vehicle was supported by a search warrant. There is no evidence a valid search warrant was executed with a showing of probable cause. The evidence obtained by Detective O'Neil and relied on by Jason Staton violated TEX. CODE OF CRIM. PRO. Art. 38.23, denied Appellant's right to confront the witness, and denied her right to due process. The trail court erred in overruling defense counsel's objection to State's Exhibits 13, 14, 15, and 16.

## POINT OF ERROR TWO

## THE TRIAL COURT ERRED BY DENYING APPELLANT THE RIGHT TO MAKE OFFERS OF PROOF REGARDING EXCLUDED EVIDENCE.

The right to make an offer of proof has repeatedly been considered absolute per *M___ A___ B___ v. State,* 718 S.W.2d 424, 425-426 (Tex.App.-Dallas 1986, no pet.); *R___ M___ G___ v. State,* 711 S.W.2d 397, 399 (Tex.App.-Dallas 1986) aff'd, 748 S.W.2d 227, 228, fn. 1 (Tex.Cr.App.1988); *Hurd v. State,* 725 S.W.2d 249, 253 (Tex.Cr.App. 1987); *Moosavi v. State,* 711 S.W.2d 53, 54 (Tex.Cr.App.1986); *Koehler v. State,* 679 S.W.2d 6, 9 and 11-12 (Clinton, J., concurring) (Tex.Cr.App.1984); and *Cook v. State,* 646 S.W.2d 952, 953 (Tex.Cr.App.1983). TEX. R. CRIM. EVID., R. 103 (c) states in pertinent part:

> "The court must allow a party to make an offer of proof as soon as practicable. In a jury trial, the court must allow a party to make the offer outside the jury's presence and before the court reads its charge to the jury."

The failure of counsel to make an offer of proof has resulted in the Courts denying appellate arguments due to the failure to preserve error. "It is firmly established that in order to complain of the exclusion of evidence, the record must indicate what the evidence would have been. When such a showing has not been made, nothing is presented for review." *Easterling v. State,* 710 S.W.2d 569, 575 (Tex.Cr.App.1986) *cert. denied,* 479 U.S. 848, 107 S.Ct. 170, 93 L.Ed.2d 108 (1986); "Appellant did not perfect a bill of exception or proffer proof to show what Chambers' testimony would have been. Under such circumstances, nothing is preserved for review." *Passmore v. State,* 617 S.W.2d 682, 685 (Tex.Cr.App.1981); *Toler v. State,* 546 S.W.2d 290, 295 (Tex.Cr.App.1977).

The failure of the record to reflect an offer of proof is not due to a failure by Appellant. Trial counsel in a continued effort to provide testimony as to the veracity of the search warrant issued a subpoena for Sheriff Bo Stallman of the Brazoria County Sheriff's Department and the District Attorney, Tom Selleck of Brazoria County. (VI R.R. at 137-38). Defense counsel requested the opportunity to make an offer of proof specifically identifying the questions which would be put forth to the

Sheriff Stallman. (VI R.R. at 137). The trial court following the hearing granted the State's motion to quash the subpoenas. (VI R.R. at 142). The trial court additionally denied the request by the appellant's trial counsel to make an offer of proof. (VI R.R. at 144).

> "A defendant who has not had an opportunity to interview a witness may make the necessary showing by establishing the matters to which the witness might testify and the relevance and importance of those matters to the success of the defense. See *United States v. Valenzuela-Bernal,* 458 U.S. at 869-71, 102 S.Ct. at 3448."

*Coleman v. State*, 966 S.W.2d 525, 528 (Tex.Crim.App. 1998).

It was apparent from the proposed questions trial counsel wanted to advance the evidence the District Attorney was aware the Officers involved in the investigation of Appellant were now subject of an investigation before the beginning of trial. Trial counsel was attempting to show the District Attorney's office was aware of possible evidence which could be considered exculpatory per *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and the District Attorney's office had failed to provide the information prior to trial. (VI R.R. at 137-38). Trial counsel was attempting to discover the possible *Brady* material thus showing a violation of *Brady v. Maryland* and provide evidence of the veracity of the probable cause affidavit which supported the search warrant used to obtain evidence of Appellant's vehicle performance before and during the accident resulting in the death of Florida Brown.

Trial counsel requested he be allowed to question Sheriff Stallman on specific matters. Trial counsel proposed the following.

> "MR. SMITH: Thank you, Your Honor. As far as the Sheriff, I think that would be the easier one. I have spoken with the Sheriff and my line of questioning with the Sheriff would be were you made aware of an investigation with Brandi Heckler and Francine Vargas? Were you -- even though I don't have a duty to give a preview of the defense's questioning, I have no issue with disclosing to the Court for my offer of proof, Your Honor, that my question would then be did you inform anybody about this investigation with the District Attorney's Office? Who? And when? I would not ask Sheriff Stallman to go into the details of his investigation or his department's investigation into either Investigators Brandi Heckler or Francine Vargas as far as the Sheriff. So that there is unequivocal proof of my offer of proof under Rule 103….
>
> …I do not believe that this Sheriff's office was engaged in any misconduct specifically related to their notification to the District Attorney's Office. I don't know what was going on with those two investigators. I can't blanketly say that nothing was going on. I am in no way imputing to Sheriff Stallman did anything wrong. I am asking for the record to be very clear that he, in fact, did have that conversation with Tom Selleck." (VI R.R. at 137-38).
>
> Continued by trial counsel:
>
> "The Sheriff is here. And even if the subpoena gets quashed, I would still ask the Sheriff to testify specifically to those questions and not about the specific investigation in a public forum." (VI R.R. at 140).

The State objected to Sheriff Stallman testifying with regard to an offer of proof arguing any conversations the Sheriff had with the District Attorney was protected by attorney/client privilege. (VI R.R. at 140). Following the request of trial counsel

and argument of the State, the trial court denied the request to make an offer of proof through Sheriff Stallman. (VI R.R. at 142).

Appellant was denied the right to show relevance with the denial of the opportunity to make an offer of proof. Counsel for appellant identified the proposed questions. Such questions would not invade the attorney/client privilege. To deny a right to make an offer of proof of the District Attorney's knowledge of an investigation and when he was made aware of the investigation of the investigator responsible for obtaining the search warrant was crucial in determining the failure of the State's duty to provide a timely notice of exculpatory evidence. To deny this evidence and an offer of proof based on the Attorney/Client privilege would defeat the rule handed down in *Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)*; *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); and *Ex parte Mitchell*, 977 S.W.2d 575 (Tex.Crim.App. 1997). Appellant's defensive theory was to challenge the investigation. To this the credibility of the officer who swore to an affidavit was critical to his defense. Although the information was provided that the investigator was under investigation during trial, the ruling denies Appellant's right to address the timing of the release of the information. The trial court denied Appellant the possibility of presenting an

argument the State failed to provide the exculpatory information timely, violating *Brady.*

Trial counsel then requested the trial court allow him to make an offer of proof through his investigator who had previously spoken with Sheriff Stallman with regards to the issue of the investigation of Brandi Heckler and Francine Vargas. (VI R.R. at 143). To this request the State objected, complaining there was no evidence to establish the relevance of Sheriff Stallman's testimony. The trial court denied the request to make an offer of proof. (VI R.R. at 144). Trial counsel responded with the following:

> "MR. SMITH: I would object that to do so denies my client of her due process. It denies me to make an offer of proof for purposes of the record. For what that conversation would entail, specifically that Sheriff Stallman stated to our investigator that he did in fact notify Tom Selleck that an investigation was ongoing, and this took place at the end of March or early April. And that to say that this isn't relevant, I am surprised that -- I know the Court is aware of Brady versus Maryland and the Schultz decision; but apparently we now are going to say that the fact that two major investigators that were involved in this case where my client, our client is charged with a first degree felony, that she's under an internal affairs investigation, she's the main proponent of three search warrants, that that information is now not relevant to this investigation and that I am fishing? We were provided under Defendant's Exhibit 1 for purposes of the record that we were informed Friday afternoon in the middle of trial this investigation was ongoing from the District Attorney. And to now say we told you enough, you don't need to know any more, just go on with trial, deprives our client, Your Honor, under her 6th and 14th Amendment rights, her 39.14

> rights under the Code of Criminal Procedure and 38.23 rights." (VI R.R. at 144-45).

Trial counsel made it clear he was attempting to discover a violation of *Brady* and provide testimony for the jury to consider the veracity of the probable cause affidavit. Trial counsel additionally noted the necessity of an offer of proof was required for appellate record. Without an offer of proof, the State's argument of relevance as to Sheriff Stallman cannot be established.

> "…trial counsel fervently and continuously requested the opportunity to make an offer of proof, but was just as fervently precluded from doing so. The court refused to admit evidence offered solely for purposes of the appellate record because it found such evidence to be immaterial and irrelevant to the case. Questions of materiality and relevancy have no effect on what can be preserved for purposes of the appellate record. A relevancy analysis is solely applicable to what is to be admitted into evidence,[3] and when the court excludes evidence, the appellant has an absolute right to place that same "irrelevant" evidence into the record for appellate review. The instant court's absolute limitation of this right constitutes error."

*Spence v. State*, 758 S.W.2d 597, 599 (Tex. Crim. App. 1988).

"In addition, we have held that '[t]he right to make an offer of proof or perfect a bill of exception is absolute.' *Spence v. State,* 758 S.W.2d 597, 599 (Tex.Crim.App.1988), *cert. denied,* 499 U.S. 932, 111 S.Ct. 1339, 113 L.Ed.2d 271 (1991)." *Kipp v. State*, 876 S.W.2d 330, 333 (Tex. Crim. App. 1994). "The right to make a bill of exception is absolute; a trial court does not have discretion to deny a

request to perfect a bill of exception." *Kipp*, 876 S.W.2d at 333-34. In support of Appellant's contention, the offer of proof of impeachment evidence is crucial in which the Court has established *Brady v. Maryland* included impeachment evidence.

> "Under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a prosecutor has an affirmative duty to turn over material, exculpatory evidence. Impeachment evidence is included within the scope of the term "exculpatory evidence." *U.S. v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985)."

*McFarland v. State*, 928 S.W.2d 482, 511(Tex.Crim.App.1996).

Appellant contends the trial courts denial of his right to make an offer of proof prevented the defense from the ability to properly complain of the exclusion of evidence.

Appellant prays that this Court sustained this point of error two.

## POINT OF ERROR THREE

## THE STATE FAILED TO PROVIDE THE PREDICATE FOR THE INTRODUCTION OF FACEBOOK POST

The trial court erred by overruling appellant's objection the State failed to lay the proper predicate in introducing Facebook post, presumably by Appellant, under Texas Rule of Evidence 901 and admitting State's Exhibit 19. The trial court's error affected Appellant's right to a fair trial.

Under Rule 104(a) Texas Rules of Evidence, "evidence has no relevance unless it is authentically what its proponent claims it to be." *Tienda v. State*, 358 S.W.3d 633, 638, (Tex. Crim. App., 2012). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. TEX.R. EVID. 90l(a)." *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015). "Rule 901(a) of the Rules of Evidence defines authentication as a condition precedent' to admissibility of evidence that requires the proponent to make a threshold showing that would be sufficient to support a finding that the matter in question is what its proponent claims it to be." *Tienda*, 358 S.W.3d 633 at 638.

> "In a jury trial, it is the jury's role ultimately to determine whether an item of evidence is indeed what its proponent claims; the trial court need only make the preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic."

*Butler*, 459 S.W.3d at 600. Generally, a claim of erroneous admission of evidence in violation of an evidentiary rule is non-constitutional error analyzed under Texas Rule of Appellate Procedure 44.2(b). *Avila v. State*, 18 S.W.3d 736, 741 (Tex. App. -- San Antonio 2000, no pet.); TEX. R. APP. PROC. 44.2(8). Under 44.2(b), reversal is required if the error had a "substantial and injurious effect or influence in

determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).

The trial court erred by admitting State's Exhibit 19 at trial over Appellant's objection under Texas Rule of Evidence 901. (VI R.R. at 64). The State moved to admit State's Exhibit 19, a document the State proposed was a Facebook post created by Appellant. (VI R.R. 64). Appellant objected to the admission of these records under Texas Rule of Evidence 901, arguing the State failed to lay a foundation sufficient to establish the post were created by Appellant. (VI R.R. 64). The trial court overruled Appellant's objection and admitted State's Exhibit 19. (VI R.R. 64).

Texas Rule of Evidence 901 requires that the proponent of the evidence provide, "evidence sufficient to support a finding that the matter in question is what its proponent claims." TEX.R. EVID. 901 (a). Authentication of text or messenger application messages may be established in a variety of ways: a witness may testify that they were the author of the messages, a witness may have seen another person send the message, or a witness may associate a cell-phone number to the messages. An association of a phone number or social media account alone may be too tenuous to link messages to the owner of the number or account. *Butler*, 459 S. W. 3d at 601-602. The court may rely on the messages "appearance, contents, substance, internal

patterns, or other distinctive characteristics to determine admissibility." *Butler*, 459 S.W.3d at 602.

In the present case, the State presented testimony from Dayde Foley employed with the Brazoria County District Attorney's Office as a felony secretary. Ms. Foley testified she was requested by the prosecutor to use her personal Facebook account to search for Appellant on Facebook. (IV R.R. at 62). Ms. Foley, finding an account associated with Appellant, using her cell phone took screen shots of the post on the account and emailed the screen shots to her email. (IV R.R. at 63). These emails were then subsequently used to create State's Exhibit 19, a photo of the appellant and a group of post discovered on the Facebook account. (IV R.R. at 64). A post created on March 12, 2022 read "There is no self-development without self-awareness. You can read as many books as you like, but if you're unable to read yourself, you'll never learn a thing." (IV R.R. at 65). March 15, 2022, "There will always be someone who can't see your worth. Don't let it be you." (IV R.R. at 65). March 15, 2022, "Stop wondering if they care about you. If you have to ask, the answer is no. The truth is hard." (IV R.R. at 66). March 15, 2022, "Stop replaying the past in your mind. It's gone. Use your mental energy to manifest something new. Don't waste your precious life force being stuck on what didn't work out or what you could have done. Do something new today. Each moment is another chance to

recreate yourself." (IV R.R. at 66). And June 17, 2022, “Loving yourself isn't vanity. It's sanity. The storms of life don't seem too bad when you have people around you that can support you. Find a licensed." (IV R.R. at 66).

The State failed to provide sufficient evidence to establish that the messages in State's Exhibit 19 were from Appellant. The proponent of the evidence, Ms. Foley has no personal knowledge of Appellant or her Facebook page. There was no authenticating testimony such as witness who saw Appellant post the message or a witness who received and acknowledged the post. There was nothing unique to connect the post to Appellant. Nothing which only Appellant could have known. The only authentication came through the testimony of Dayde Foley that she located a Facebook account containing the picture of Appellant.

In *Tienda* the Court was called upon to address the admissibility of certain electronic messages obtained from a “MySpace” account linked to the accused in which certain inculpatory remarks were discovered. This Court framed the issue in the following language: “Rule 901(a) of the Rules of Evidence defines authentication as a ‘condition precedent’ to admissibility of evidence that requires then proponent to make a threshold showing that would be ‘sufficient to support a finding that the matter in question is what its proponent claims.’” *Tienda*, 358 S.W.3d at 637.

> "Printouts of emails, internet chat room dialogues, and cellular phone text messages have all been admitted into evidence when found to be sufficiently linked to the purported author so as to justify submission to the jury for its ultimate determination of authenticity. Such prima facie authentication has taken various forms. In some cases, the purported sender actually admitted to authorship, either in whole or in part, or was seen composing it. In others, the business records of an internet service provider or a cell phone company have shown that the message originated with the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone. Sometimes the communication has contained information that only the purported sender could be expected to know. Sometimes the purported sender has responded to an exchange of electronic communications in such a way as to indicate circumstantially that he was in fact the author of the particular communication, the authentication of which is in issue."

*Tienda*, 358 S.W. 3rd at 639-41.

Ms. Foley's testimony, as is the concern of the Courts in evaluating the authenticity and reliability of electronic communications, is that individuals can make up Facebook posts about other individuals and create fake accounts as well as fake posts. (IV R.R. at 68). Appellant contends the State failed to establish she was responsible for creating and maintaining the content of the Facebook account by merely presenting the photos and quotes from the website presumably on Appellant's account.

Appellant prays that this Court sustained this point of error three.

## POINT OF ERROR FOUR

## THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT A RIGHT TO PRESENT A COMPLETE DEFENSE

The limitation of Appellant's defense offended his Sixth Amendment right to present a defense. The defense attempted throughout the trial to test the veracity of the search warrant not properly authenticated during trial or presented to the jury in its complete form which would include the supporting affidavit. In an attempt to present the issue to the jury the defense sought to impeach the investigator who drafted the affidavit in support of the search warrant but was not called by the State to testify. Defense counsel's position is the affidavit of the search warrant is required to provide the jury with bases of the search warrant thus providing the jury with ability to understand the reasoning that supports the search of Appellant's vehicle. To this end, the witness who provided the affidavit in support of the search warrant is required for the introduction of affidavit. (VI R.R. at 38). Thus, if the affidavit is to be introduced the defense would be able to attack the credibility of the investigator thus attacking the credibility of the search warrant. The trial court suggests the introduction of affidavit without proper authentication. (VI R.R. at 38). To this the defense objected that the affidavit is hearsay. (VI R.R. at 38). The introduction would only provide the jury with the untested statements of the investigator who wrote the affidavit and denying Appellant a right to confront

the witness. *Crawford v. Washington,* 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365-66, 158 L. Ed. 2d 177 (2004). The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The trial court then instructs the State to remark the exhibit and submit exhibit #18 without the affidavit. (VI R.R. at 38). To this the Defense objected to the lack of probable cause to support the search warrant. (VI R.R. at 38). This objection is overruled and the search warrant without the affidavit is submitted for the jury to consider. (VI R.R. at 39).

With the search warrant having been admitted into evidence and thus presumptively valid authority for the search of Appellant's vehicle, it was incumbent on defense counsel to produce evidence which test the credibility of the supporting affidavit. *Rumsey v. State*, 675 S.W.2d 517, 520 (Tex. Crim. App. 1984). The credibility of the affidavits supporting witness becomes crucial to defending the indicted charge and presenting a 38.23 charge to the jury. The defense was correct in objecting to the introduction of the affidavit without the testimony of the investigator who swore to the contents. The trial courts acceptance of the search warrant without the affidavit prevented the defense from contesting the authority of the warrant. The affidavit is necessary to support any proposed 38.23 evidence

the defense may develop under Tex. Code Crim. Pro. art 38.23. The affidavit would have been crucial had the trial court accepted the 38.23 jury charge instruction. Appellant acknowledges the burden to show the invalidity of the warrant is on the defense, however without the introduction of the affidavit the defense cannot challenge the validity of the warrant. Here the trial court instructed the State to remark the exhibit indicating the trial court was instructing the original exhibit #18 which included the affidavit to be preserved and a second exhibit would contain the search warrant without the affidavit would be submitted to the jury. However, the original exhibit #18 is not within the record and the exhibit entered is labeled exhibit #18. Appellant asserts the failure of the record to contain the affidavit does not lie in the failure of the Defense as prescribed by *Miller v.* State, 636 S.W.2d 643, 648 (Tex. Crim. App. 1984).

The trial court denied Appellant's right to meet the required procedure of presenting evidence to the jury of the legality of the search warrant. *Rogers v. United States,* 330 F.2d 535 (5th Cir. 1964) ; *Batten v. United States,* 188 F.2d 75 (5th Cir. 1951); *Chin Kay v. United States,* 311 F.2d 317 (9th Cir. 1962). The trial court denied and interfered with the Appellant's right to have the evidence for the jury to consider.

The State, during the examination of State witnesses provides the jury testimony of a presumably valid search warrant with no issue of impropriety. The defense is limited to a baseless argument, an argument without a cross-examination which contests the validity of said search warrant by denying the right to provide evidence in support of this complaint. *Washington v. Texas*, 388 US 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). "grants to the accused *personally* the right to make his defense." *Faretta v. California*, 422 US 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Appellant contends that reversal is warranted because the trial court's evidentiary errors deprived him of his constitutional right to present a complete defense. *Wiley v. State,* 74 S.W.3d 399, 405 (Tex.Crim.App.2002).

> "On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which " `would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart* v. *Janis,* 384 U. S. 1, 3." *Smith* v. *Illinois,* 390 U. S. 129, 131 (1968)."

*Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The appellant respectfully request the Court sustain point of error number four.

## POINT OF ERROR FIVE

## THE TRIAL COURT ERRED IN ORDERRING FEES TO BE REPAID BY THE APPELLANT

Per *Wiley v. State*, 410 S.W.3d 313 (Tex. Crim. App. 2013) if a defendant has been found indigent, this indigence is presumed to remain unless the record can show the defendant's financial status has changed. Following trial, the trial court found Appellant indigent and appointed appellate counsel on May 02, 2024. (C.R. at 163). The trial court additionally signed an "Order to Withhold Funds." (C.R. at 163). This order directs the Texas Department of Criminal Justice to withhold funds from Appellants inmate trust account to repay unpaid court cost, fees and/or fines and/or restitution. The record does not contain evidence Appellant financial status changed prior to the judgement signed by the trial court. The record is insufficient to support Appellant's financial status has changed, the trial court erred in ordering Appellant to pay reimbursement fees and cost.

Appellant request this Honorable Court to reform the judgement to reflect Appellant is not ordered to repay said fees unsupported by the record.

## PRAYER

WHEREFORE, PREMISE CONSIDERED, Appellate Counsel respectfully prays this Honorable Court sustain Appellants points of Error, reverse the trial courts judgement, and remand for a new trial.

Respectfully Submitted,
Perry R. Stevens
Attorney at Law
P.O. Box 17
Angleton, Texas 7751-0017
perrystevens14@gmail.com
(979)848-1111

By: /S/ Perry Stevens
Perry Stevens
Attorney for Appellant
Texas State Bar #00797496

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded to Tom Selleck, 111 East Locust, Suite 408A, Angleton, Texas 77515, on December 19, 2024.

/S/ Perry Stevens
Perry Stevens
Attorney for Appellant
State Bar #00797496

## CERTIFICATE OF COMPLIANCE

I hereby certify, per Texas Rules of Appellate Procedure 9.4i (1), 9.4i (2) (B), and 9.4i (3), this brief is a computer-generated document, and the computer program used to prepare the document calculates the word count to be 9,235 words.

/S/ Perry Stevens
Perry Stevens
Attorney for Appellant
P.O. Box 17
Angleton, TX 77516-0017
(979) 848-1111
perrystevens14@gmail.com

# Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Perry Stevens
Bar No. 00797496
pstevenslawoffice@sbcglobal.net
Envelope ID: 95117684
Filing Code Description: Brief Not Requesting Oral Argument
Filing Description: Appellant's Brief
Status as of 12/10/2024 7:31 AM CST

Case Contacts

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Tom Selleck | | Bcdaeservice@brazoria-county.com | 12/9/2024 6:27:25 PM | SENT |