No. 01-24-00483-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

DARYL DWAIN HATTER
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1651706
From the 176th District Court of Harris County, Texas
Hons. Denise Collins, Marc Brown, Judges Presiding

BRIEF FOR THE APPELLANT

Oral Argument Requested

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PRESIDING JUDGE:	Hon. Denise Collins Hon. Marc Brown 176th District Court, Emergency Relief Trial Docket Harris County, Texas 1201 Franklin St. Houston, Texas 77002

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STATEMENT OF THE CASE

On March 30, 2020, Daryl Dwain Hatter (Appellant) was charged by indictment with aggravated sexual assault of a child under fourteen years of age, a first-degree felony. (C.R. 37).[1] The State moved to amend the indictment, which was granted on August 16th, 2023. (C.R. 287). Appellant pled not guilty and proceeded with a trial by jury. A jury acquitted Appellant of the indicted offense and found him guilty of the lesser-included offense of indecency by contact, a second-degree felony. (C.R. 427). Appellant pleaded true to two enhancement paragraphs; the court found them true, the sentence was enhanced under the habitual offender statute, and the court sentenced him to thirty years in the Texas Department of Criminal Justice – Correctional Institutions Division. (C.R. 427). The trial court certified Appellant's right of appeal and he timely filed notice of appeal. (C.R. 432-34).

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument.

[1] The Clerk's Record will be cited as "C.R." and the Reporter's Record will be cited as "R.R." preceded by the volume number.

ISSUES PRESENTED

Issue I: The jury charge erroneously allowed a conviction on a lesser-included offense that was not authorized by the indictment by expanding the allegations therein. This caused egregious harm.

Issue II: The jury charge erroneously omitted an instruction that the jury must be unanimous on which act constituted indecency with a child if it decided to convict on the lesser-included offense. This caused egregious harm.

Issue III: The amended indictment violated Appellant's right to be indicted by a grand jury under Article I, Section 10 of the Texas Constitution, as it alleged a different statutory offense than the original indictment and was not reviewed for probable cause by a grand jury. The judgment is therefore void.

Issue IV: Defense counsel was ineffective in failing to object to the State's motion to amend the indictment under Texas Code of Criminal Procedure § 28.10. The amended indictment violated Appellant's right to be indicted by a grand jury under Article I, Section 10 of the Texas Constitution because it alleged a different statutory offense from the original indictment that was not reviewed for probable cause by a grand jury.

STATEMENT OF FACTS

Daryl Dwain Hatter, the Appellant, was accused of sexually assaulting his ten-year-old son. The original indictment signed by the grand jury alleged that Mr. Hatter caused the penetration of the child's anus with his sexual organ. (C.R. 37, 285-87). The State moved to amend the indictment to allege that Mr. Hatter did "intentionally and knowingly cause the penetration of the mouth of [the complainant], a person younger than fourteen years of age, with the sexual organ of the Defendant." (C.R. 37, 285-87). The motion to amend was granted without recorded objection from defense counsel.

At trial, the State elicited that on the day of the alleged incident, the complainant's stepmother, Angela Grant, had walked into the bathroom and noticed that Mr. Hatter

and the complainant were in the shower together. (4R.R. 117, 130). She believed they were both in there together but did not see or hear anything happening; she "just heard water." (4R.R. 132). Mr. Hatter stated they were showering at the same time because he thought they were in a rush. (4R.R. 133, 156). This made Grant uncomfortable, and she called the complainant's mother the next day, who had the complainant dropped off so she could take him home. (4R.R. 54, 136). The complainant's mother talked to the complainant about the alleged incident but then shut the complainant down because she did not want to hear about it. (4R.R. 65-66).

Two years later, the complainant was alleged to have exposed himself to his younger niece and "asked her to put his penis in her mouth." (8R.R. 13, St. Ex. 3). The complainant's mother made some sort of report to Child Protective Services. (4R.R. 63). The complainant's mother testified that the complainant had exposed himself to his sister's young child (the complainant's niece). (4R.R. 67). The complainant then claimed that Mr. Hatter had assaulted him on his mouth and his "backside" in a structured interview with the Children's Assessment Center. (8R.R. St. Ex. 3).

At trial, the complainant testified his mouth had come into contact with Mr. Hatter's sexual organ but did not testify about any touching on the anal region. However, the report from the CAC reflected that the complainant had reported his father "forced [him] to perform oral sex and various other sexual acts." (8R.R. 13, St. Ex. 3). He stated his father touched him with his hands, his mouth, and his private area on the complainant's "private area" and "backside." (8R.R. 14, St. Ex. 3). He alleged it

happened "more than once." *Id.* But at trial, after explaining the alleged shower incident purportedly involving the complainant's mouth coming into contact with his father's sexual organ, the complainant said he did not remember when asked, "So all you remember was that your dad put his penis in your mouth, correct?" (4R.R. 258-59).

In a jury note, the jury asked if it was allowed to consider the fact that Mr. Hatter had rescheduled and canceled a police interview. (C.R. 425). As for the jury charge, the trial court instructed the jury the following:

> Our law provides that a person commits the offense of indecency with a child if, with a child younger than seventeen years of age, whether the child is of the same or opposite sex, he engages in sexual contact with the child or causes the child to engage in sexual contact.
>
> "Sexual contact" means any touching of any part of the body of a child, including touching through the clothing, with the anus, breast, or any part of the genitals of a person with the intent to arouse or gratify the sexual desire of any person.
>
> Therefore, if you find from the evidence beyond a reasonable doubt that on or about the 16th day of December, 2016, in Harris County, Texas, the defendant, Daryl Dwain Hatter, did then and there unlawfully, intentionally or knowingly cause D.H., a child under the age of seventeen to contact any part of the genitals of the defendant, with the intent to arouse or gratify the sexual desire of the defendant, then you will find the defendant guilty of indecency with a child.

(C.R. 418). In closing argument, the State said, "I know you've heard some evidence about lots of different sexual acts." (6R.R. 100). It continued that, regarding the aggravated sexual assault, it was only asking the jury to consider whether Mr. Hatter's penis penetrated the complainant's mouth. *Id.* It attempted to explain the difference between aggravated sexual assault and indecency in this case: "[I]t's aggravated sexual

assault if the defendant's penis goes into the boy's mouth. That's penetration by the sexual organ, if it goes in." (6R.R. 100-01). It continued: "Indecency by contact is if that man's penis touches anywhere on [the complainant's] body, including the mouth, face, hands, anus. If it touches anywhere, that's indecency." (6R.R. 101). Mr. Hatter was then convicted of the lesser-included offense of indecency with a child by contact. (C.R. 424, 427).

SUMMARY OF THE ARGUMENT

I: The jury charge erroneously expanded the indictment by instructing on each different statutory offense described in Texas Penal Code § 21.11 (Indecency). The indictment here only authorized the lesser-included offense of indecency by contact by the actor's sexual organ contacted the complainant's mouth. However, the jury charge allowed conviction on indecency with a child by contact on any statutory offense covered by the indecency statute, including that Mr. Hatter's sexual organ came into contact with the complainant's anus. The law is clear that the various conduct described in the statute are not mere manner and means, but separate and distinct offenses. Therefore, the jury charge instructed on several offenses that the State argued could constitute a lesser-included offense of the crime charged, and which were not authorized by the indictment. Mr. Hatter was egregiously harmed by this jury charge error.

II: The jury charge erroneously allowed a non-unanimous verdict because it instructed the jury it could convict on any conduct described by the indecency statute, and the evidence manifested multiple separate events upon which the jury could have convicted. However, the charge failed to instruct the jury that it must be unanimous on which conduct or event constituted the lesser-included offense of indecency by contact. Mr. Hatter was then convicted of the lesser-included offense of indecency. He was egregiously harmed by this jury charge error.

III: Appellant's right to be indicted by a grand jury under Article I, Section 10 of the Texas Constitution was violated when the indictment was amended to allege a different statutory offense not previously reviewed for probable cause by a grand jury. The original indictment alleged an offense pursuant to Texas Penal Code § 22.021(a)(1)(B)(i) (penetration of the anus of a child by the actor's sexual organ). However, the amended indictment alleged an offense pursuant to Texas Penal Code § 22.021(a)(1)(B)(ii) (penetration of the child's mouth by the actor's sexual organ). Binding precedent from the Court of Criminal Appeals has held that the Legislature intended that each separately described conduct in the aggravated sexual assault of a child statute constitutes a separate statutory offense. Although trial counsel did not object to the amended indictments, Mr. Hatter's right under the Texas Constitution to be indicted by a grand jury is non-forfeitable and can be raised for the first time on appeal. As the amended indictment was not returned by a grand jury, the judgment in this case is void.

IV: Trial counsel rendered ineffective assistance of counsel when he failed to object to the amended indictment under Texas Code of Criminal Procedure article 28.10 because it alleged a different statutory offense than the indictment originally filed. As a result of trial counsel's failure to object to the amended indictments, Mr. Hatter suffered prejudice as the amended indictments denied him his right to an indictment by a grand jury. If trial counsel had objected to the amended indictment at trial, it would have been error for the trial court not to sustain the objection.

ARGUMENT

Issue I: The jury charge erroneously allowed a conviction on a lesser-included offense that was not authorized by the indictment by expanding the allegations therein. This caused egregious harm.

The amended indictment in this case alleged that Mr. Hatter did "intentionally and knowingly cause the penetration of the mouth of [the complainant], a person younger than fourteen years of age, with the sexual organ of the Defendant." (C.R. 37, 285-87). The State presented evidence that Mr. Hatter allegedly touched the complainant's mouth with his penis, and that he allegedly touched the complainant's anus with his penis. *See, e.g.*, (8R.R. 13-14, St. Ex. 3). This evidence also indicated the complainant claimed Mr. Hatter had him engage in "various other sexual acts." (8R.R. 13, St. Ex. 3). He stated his father touched him with his hands, his mouth, and his private area on the complainant's "private area" and "backside." (8R.R. 14, St. Ex. 3). He alleged it happened "more than once." *Id.*

The trial court instructed the jury the following:

> Our law provides that a person commits the offense of indecency with a child if, with a child younger than seventeen years of age, whether the child is of the same or opposite sex, he engages in sexual contact with the child or causes the child to engage in sexual contact.
>
> "Sexual contact" means any touching of any part of the body of a child, including touching through the clothing, with the anus, breast, or any part of the genitals of a person with the intent to arouse or gratify the sexual desire of any person.
>
> Therefore, if you find from the evidence beyond a reasonable doubt that on or about the 16th day of December, 2016, in Harris County, Texas, the defendant, Daryl Dwain Hatter, did then and there unlawfully, intentionally or knowingly cause D.H., a child under the age of seventeen to contact any part of the genitals of the defendant, with the intent to arouse or gratify the sexual desire of the defendant, then you will find the defendant guilty of indecency with a child.

(C.R. 418). In closing argument, the State said, "I know you've heard some evidence about lots of different sexual acts." (6R.R. 100). It continued that, regarding the aggravated sexual assault, it was only asking the jury to consider whether Mr. Hatter's penis penetrated the complainant's mouth. *Id.* It attempted to explain the difference between aggravated sexual assault and indecency in this case: "[I]t's aggravated sexual assault if the defendant's penis goes into the boy's mouth. That's penetration by the sexual organ, if it goes in." (6R.R. 100-01). However, it continued: "Indecency by contact is if that man's penis touches anywhere on [the complainant's] body, <u>including the mouth, face, hands, anus.</u> If it touches anywhere, that's indecency." (6R.R. 101) (emphasis added).

The jury acquitted Mr. Hatter of aggravated sexual assault but convicted him of the lesser-included offense of indecency with a child by contact. (C.R. 427).

A. Standard of Review

In analyzing a jury charge issue, an appellate court's first duty is to decide whether error exists. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). If error exists, the court then analyzes that error for harm. *Id.* If the appellant did not object to the charge, the appeal courts examine the record for egregious harm rather than "some harm." *Id.*; *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc). Errors that result in egregious harm are those that affect "the very basis of the case," "deprive the defendant of a valuable right," or "vitally affect a defensive theory." *Ngo v. State,* 175 S.W.3d 738, 750 (Tex. Crim. App. 2005). It is fundamental error when the erroneous instruction "authoriz[es] any diminution of the State's burden of proof." *Robinson v. State*, 596 S.W.2d 130, 132 (Tex. Crim. App. 1980) (en banc).

B. Applicable Law

Any person charged with a crime is entitled to notice of his criminal charges under both the State and Federal constitutions. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. The State may prosecute a defendant for a lesser-included offense of the indicted offense even if it is not specifically alleged. *See McKithan v. State*, 324 S.W.3d 582, 588 (Tex. Crim. App. 2010). Such lesser offense must be "established by proof of the same or less than all the facts required to establish the commission of the offense charged." TEX. CODE CRIM. PRO. art. 37.09.

To determine if an offense is a lesser-included of the greater offense charged in the indictment, the reviewing court must ask whether the indictment "alleges all of the elements of the lesser-included offense" or "alleges elements plus facts" (i.e., manner and means) "from which all of the elements of the lesser-included offense may be deduced." *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009).

Aggravated sexual assault, in relevant part here, is committed when a person intentionally or knowingly and "regardless of whether the person knows the age of the child [younger than 14 years of age] at the time of the offense":

> (i) Causes the penetration of the anus or sexual organ of a child by any means;
> (ii) Causes the penetration of the mouth of a child by the sexual organ of the actor;
> (iii) Causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
> (iv) Causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
> (v) Causes the mouth of a child to contact the anus or sexual organ of another person, including the actor[.]

TEX. PENAL CODE § 22.021(a)(1)(B), (2)(B).

Indecency with a child by contact is committed when, "with a child younger than 17 years of age . . . the person [] engages in sexual contact with the child or causes the child to engage in sexual contact." TEX. PENAL CODE § 21.11. "Sexual contact" is defined as "(1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child" or "(2) any touching of any part of

the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person." *Id.* at (c).

As for 22.021 (aggravated sexual assault), the Court of Criminal Appeals held that each subsection describing penetration of a different area of the body is a distinct and separate offense. *Vick v. State*, 991 S.W.2d 830, 832-33 (Tex. Crim. App. 1999). Likewise, 21.11 (indecency) is a conduct-oriented offense and criminalizes three distinct forms of conduct, creating separate offenses. *Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007). For example, an allegation that a child's breasts were touched constitutes an indecency offense that is a different offense than if the indecent contact was made with the child's sexual organ. *Id.* at 716-19. Therefore, the area of the child's body that was alleged to have been inappropriately contacted is not mere manner and means but rather an element of the crime. *Id.*

C. Analysis

i. Jury Charge Error

The jury charge in this case allowed conviction on un-indicted offenses, violating Mr. Hatter's due process rights. *Gooden v. State*, 576 S.W.2d 382, 382-83 (Tex. Crim. App. 1979) (en banc) (finding "fundamental error" where a "charge authorizes a conviction on a theory not charged in the indictment"). The amended indictment here alleged that Mr. Hatter's sexual organ penetrated the complainant's mouth and that the complainant was under the age of fourteen (aggravated sexual assault). (C.R. 37) (reflecting the amended indictment). The only lesser-included offense authorized by

this indictment would be on the theory that Mr. Hatter's sexual organ made contact with the mouth of the complainant rather than penetrated the mouth. TEX. CODE CRIM. PRO. art. 37.09 (lesser offense is "established by proof of the same or less than all the facts required to establish the commission of the offense charged"); *Vick*, 991 S.W.2d at 833 (explaining in double jeopardy context that an allegation involving a defendant's sexual organ penetrating a child's sexual organ is a separate and distinct offense from an allegation that the defendant's mouth touched the child's sexual organ).

The State presented evidence of multiple purported acts—the CAC evidence showed the complainant initially claimed he was forced to contact his father's sexual organ with his mouth, and additionally that he was forced to contact his father's sexual organ by his anus; the report also mentioned "various other sexual acts." (8R.R. 13-14, St. Ex. 3). The State then stated in closing argument, "I know you've heard some evidence about lots of different sexual acts." (6R.R. 100). It then argued that the jury could convict on the lesser-included offense of indecency if it found that any part of the complainant's body was touched inappropriately, "including the mouth, face, hands, anus." (6R.R. 100-01).

The jury charge mirrored this vast expansion of what was authorized by the indictment. (C.R. 418). Rather than instructing that the jury could convict if it found Mr. Hatter's sexual organ contacted the complainant's mouth only, it instructed the jury that it could convict Mr. Hatter on indecency with a child by contact if it found Mr. Hatter caused the complainant to "contact" Mr. Hatter's genitals, defining "sexual

contact" as the "touching of any part of the body of a child, including touching through the clothing, with the anus, breast, or any part of the genitals of a person with the intent to arouse or gratify the sexual desire of any person." (C.R. 418). It therefore instructed the jury it could convict on any un-indicted theory of indecency rather than just the lesser-included offense authorized by the indictment, violating Mr. Hatter's right to due process.

ii. Harm

The Texas Court of Criminal Appeals has recognized that jury charge error where the charge instructs on a theory not authorized by the indictment needs no harm analysis and such a case must be reversed. *Gooden*, 576 S.W.2d at 383.

However, if this Court finds a harm analysis necessary, it would be under egregious harm due to lack of objection to the charge. Egregious harm is a "high and difficult standard" to meet, and such a determination must be "borne out by the trial record." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013) (citations omitted). On appeal, neither party bears the burden of showing harm or a lack thereof under this standard. *Warner v. State,* 245 S.W.3d 458, 464 (Tex. Crim. App. 2008). A defendant must have suffered "actual rather than theoretical harm." *Cosio v. State,* 353 S.W.3d 766, 777 (Tex. Crim. App. 2011).

"In examining the record to determine whether charge error has resulted in egregious harm to a defendant, we consider (1) the entirety of the jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence,

(3) the arguments of counsel" and anything else from the record that is relevant. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

Had Mr. Hatter been convicted of aggravated sexual assault of a child, the harm here would have been more theoretical than actual because the charge instructed as to aggravated sexual assault only what was indicted. (C.R. 417-18). However, the jury acquitted Mr. Hatter of aggravated sexual assault. He was convicted of the lesser-included offense of indecency which is the offense whose definition was vastly overinclusive in the charge. (C.R. 418).

Jury Charge as a Whole

This error was compounded because it also created an unanimity issue. *See infra*, Issue II, pp. 16-27. The right to notice of a criminal charge against a person and the right to an unanimous verdict are fundamentally important due process rights enshrined in both state and federal law. U.S. CONST. amend. VI; TEX. CONST. arts. I, § 10, 15; *Ramos v. Louisiana*, 590 U.S. 83, 100 (2020); *Randel v. State*, 219 S.W.2d 689, 698 (Tex. Crim. App. 1949); *Ngo,* 175 S.W.3d at 750. The application section of the jury charge did not narrow the definition as applied to this case—it stated simply that if the jury found Mr. Hatter caused the complainant "to contact any part of the genitals of the defendant" with the requisite intent, that it could find him guilty of the lesser-included. (C.R. 418).

State of the Evidence

Two years after the alleged shower incident, the complainant was alleged to have exposed himself to his younger niece and "asked her to put his penis in her mouth." (8R.R. 13, St. Ex. 3). The complainant's mother made some sort of report to Child Protective Services. (4R.R. 63). The complainant's mother testified that the complainant had exposed himself to his sister's young child (the complainant's niece). (4R.R. 67). The complainant then claimed that Mr. Hatter had assaulted him on his mouth and his "backside" in a structured interview with the Children's Assessment Center, among other things. (8R.R. St. Exs. 3, 5).

At trial, the complainant testified his mouth had come into contact with Mr. Hatter's sexual organ but did not testify about any touching on the anal region. However, the interview and report from the CAC reflected that the complainant had reported his father "forced [him] to perform oral sex and various other sexual acts." (8R.R. 13, St. Exs. 3, 5). He stated his father touched him with his hands, his mouth, and his private area on the complainant's "private area" and "backside." (8R.R. 14, St. Ex. 3). He alleged it happened "more than once." *Id.* Though this more expansive account of multiple alleged incidents was not reflected in the complainant's testimony at trial, it was contained in two major pieces of evidence highlighted by the State. (8R.R. St. Exs. 3, 5; 6R.R. 100). The more expansive definition of indecency included in the jury charge envelopes these multiple alleged instances of conduct, expanding on what was indicted. This weighs in favor of finding actual egregious harm.

Arguments of Counsel

As for counsels' arguments, the State informed the jury it could simply pick whatever act it wanted that it felt met the elements of an indecency offense. (6R.R. 101). It even stated, "I know you've heard some evidence about lots of different sexual acts." (6R.R. 100). Though it clarified the jury must unanimously agree whether Mr. Hatter's sexual organ went "into that boy's mouth" as to aggravated sexual assault, it distinguished indecency from this explanation and stated, "Indecency by contact is if that man's penis touches anywhere on [the complainant's] body, including the mouth, face, hands, anus." (C.R. 101). This militates in favor of finding egregious harm.

The State's argument in combination with the jury charge as a whole—and against the backdrop of a mosaic of statements regarding Mr. Hatter's alleged conduct—ensured this charge error would egregiously harm Mr. Hatter. Because the jury charge erred in including an instruction on indecency that vastly expanded on what was authorized as a lesser-included offense by the indictment, and because this egregiously harmed Mr. Hatter, this Court should reverse and remand for a new trial.

Issue II: The jury charge erroneously omitted an instruction that the jury must be unanimous on which act constituted indecency with a child if it decided to convict on the lesser-included offense. This caused egregious harm.

The amended indictment in this case alleged that Mr. Hatter did "intentionally and knowingly cause the penetration of the mouth of [the complainant], a person younger than fourteen years of age, with the sexual organ of the Defendant." (C.R. 37,

285-87). The State presented evidence that Mr. Hatter allegedly touched the complainant's mouth with his penis, and that he allegedly touched the complainant's anus with his penis, among various other conduct. *See, e.g.*, (8R.R. 13-14, St. Ex. 3).

In closing argument, the State said, "I know you've heard some evidence about lots of different sexual acts." (6R.R. 100). It continued that, regarding the aggravated sexual assault, it was only asking the jury to consider whether Mr. Hatter's penis penetrated the complainant's mouth. *Id.* It attempted to explain the difference between aggravated sexual assault and indecency in this case: "[I]t's aggravated sexual assault if the defendant's penis goes into the boy's mouth. That's penetration by the sexual organ, if it goes in." (6R.R. 100-01). However, it continued that, "Indecency by contact is if that man's penis touches anywhere on [the complainant's] body, including the mouth, face, hands, anus. If it touches anywhere, that's indecency." (6R.R. 101).

The jury charge mentioned the word "unanimous" three times. First, it stated, "if you unanimously find from the evidence . . . that . . . [Mr. Hatter caused] the penetration of the mouth of [the complainant] . . . with the sexual organ of the defendant, then you will find the defendant guilty of aggravated sexual assault of a child, as charged in the indictment." (C.R. 417-18). It instructed if it did not find Mr. Hatter committed aggravated sexual assault beyond a reasonable doubt, it must acquit him of that charge and consider the lesser-included offense of indecency. *Id.* at 418. The trial court then instructed the jury the following:

> Our law provides that a person commits the offense of indecency with a child if, with a child younger than seventeen years of age, whether the child is of the same or opposite sex, he engages in sexual contact with the child or causes the child to engage in sexual contact.
>
> "Sexual contact" means any touching of any part of the body of a child, including touching through the clothing, with the anus, breast, or any part of the genitals of a person with the intent to arouse or gratify the sexual desire of any person.
>
> Therefore, if you find from the evidence beyond a reasonable doubt that on or about the 16th day of December, 2016, in Harris County, Texas, the defendant, Daryl Dwain Hatter, did then and there unlawfully, intentionally or knowingly cause D.H., a child under the age of seventeen to contact any part of the genitals of the defendant, with the intent to arouse or gratify the sexual desire of the defendant, then you will find the defendant guilty of indecency with a child.

(C.R. 418). It did not instruct the jury had to be unanimous on which instructed act constituted the lesser crime of indecency. The next mention of unanimity was when the charge instructed only that the jury must be unanimous as to the verdict. (C.R. 421). The final mention is when the charge instructed, "[Y]our verdict must be by a unanimous vote." (C.R. 422).

The jury acquitted Mr. Hatter of aggravated sexual assault and convicted him of the lesser-included offense of indecency with a child by contact. (C.R. 427).

A. Standard of Review

In analyzing a jury charge issue, an appellate court's first duty is to decide whether error exists. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). If error exists, the court then analyzes that error for harm. *Id.* If the appellant did not object to the charge, the appeal courts examine the record for egregious harm rather than "some

harm." *Id.*; *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc). Errors that result in egregious harm are those that affect "the very basis of the case," "deprive the defendant of a valuable right," or "vitally affect a defensive theory." *Ngo v. State,* 175 S.W.3d 738, 750 (Tex. Crim. App. 2005). It is fundamental error when the erroneous instruction "authoriz[es] any diminution of the State's burden of proof." *Robinson v. State*, 596 S.W.2d 130, 132 (Tex. Crim. App. 1980) (en banc).

B. Applicable Law

Every criminal defendant has a fundamental right to a unanimous verdict as part and parcel of his right to a trial by jury. U.S. CONST. amend. VI; *Ramos*, 590 U.S. at 100. This right is reflected in Texas state law. *E.g.*, TEX. CONST. art. I, § 15; *Randel*, 219 S.W.2d at 698.

"Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. This means that the jury must agree upon a single and discrete incident that would constitute the commission of the offense alleged." *Smith v. State*, 515 S.W.3d 423, 428 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (internal quotations omitted), quoting *Cosio v. State*, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). "Under our state constitution, jury unanimity is required in felony cases, and, under our state statutes, unanimity is required in all criminal cases. Unanimity in this context means that each and every juror agrees that the defendant committed the same, single, specific criminal act." *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005) (internal citation omitted).

"Non-unanimity may result 'when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions.'" *Smith*, 515 S.W.3d at 428, quoting *Cosio*, 353 S.W.3d at 772 and citing *Flores v. State*, 513 S.W.3d 146 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). "Each of the multiple incidents individually establishes a different offense or unit of prosecution." *Cosio*, 353 S.W.3d at 772. "The judge's charge, to ensure unanimity, would need to instruct the jury that its verdict must be unanimous as to a single offense or unit of prosecution among those presented." *Id.*

Indecency with a child by contact is committed when, "with a child younger than 17 years of age . . . the person [] engages in sexual contact with the child or causes the child to engage in sexual contact." TEX. PENAL CODE § 21.11. "Sexual contact" is defined as "(1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child" or "(2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person." *Id.* at (c). TEX. PENAL CODE § 21.11 (indecency) is a conduct-oriented offense and criminalizes several distinct forms of conduct, creating separate offenses. *Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007). For example, an allegation that a child's breasts were touched constitutes an indecency offense that is a different offense than if the indecent contact was made with the child's sexual organ. *Id.* at 716-19.

"A defendant may choose to require the State to elect a specific criminal act that it relies upon for conviction." *Smith*, 515 S.W.3d at 428, citing *Cosio*, 353 S.W.3d at 775 and *O'Neal v. State*, 746 S.W.2d 769, 772 (Tex. Crim. App. 1988). "The choice is strategic and may be waived or forfeited." *Id.* at 428-429, citing *Cosio*, 353 S.W.3d at 775. However, "[e]ven if the defendant does not require an election, the trial judge bears the ultimate responsibility to ensure unanimity through the instructions in the jury charge." *Id.*, citing *Cosio*, 353 S.W.3d at 776.

A "trial judge must 'distinctly set[ ] forth the law applicable to the case' in the jury charge." *Reeves v. State*, 420 S.W.3d 812, 818 (Tex. Crim. App. 2013), citing TEX. CODE CRIM. PRO. art. 36.14. "'It is not the function of the charge merely to avoid misleading or confusing the jury; it is the function of the charge to lead and to prevent confusion.'" *Id.*, quoting *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977).

C. Analysis

i. Jury Charge Error

Appellant was entitled to a jury charge that instructed the jury it had to be unanimous on which event constituted indecency by contact if it decided to convict on the lesser-included offense. *Ngo*, 175 S.W.3d at 748. The Court of Criminal Appeals has been clear that when multiple theories of the crime arise from the evidence, the "boilerplate section of the jury charge dealing with selection of the jury foreman" relating to the requirement to unanimously agree upon a verdict is not sufficient. *Id.* at 745.

The jury charge here instructed the jury must be unanimous as to whether Mr. Hatter committed aggravated sexual assault by penetrating the mouth of the complainant, but it instructed the jury as to indecency that it could convict on any statutory theory; after the indecency instructions, the charge only contained the boilerplate unanimity language. (C.R. 417-22). The State presented evidence that indecency occurred in multiple separate ways—for instance, the medical documents in evidence contain statements that the complainant told medical professionals his father's sexual organ touched his mouth and his anus. (8R.R. 13-14, St. Ex. 3).

The Texarkana Court of Appeals has found error and egregious harm in an aggravated sexual assault of a child case for the failure to include an unanimity instruction. *Williams v. State*, 474 S.W.3d 850 (Tex. App.—Texarkana 2015, no pet.). In *Williams,* the appellant "argued that the trial court should have required the jury to reach a unanimous verdict regarding whether [appellant] penetrated [the complainant's] sexual organ or her anus." *Id.* at 852-853. "The charge mirrored the indictment, authorizing conviction if the jury found, beyond a reasonable doubt, on one hand, that Williams engaged in aggravated sexual assault of a child by penetrating [the complaint's] sexual organ and, on the other hand, if the jury, using the same standard of proof, found that Williams engaged in aggravated sexual assault of a child by penetrating her anus." *Id.* at 853. In determining that the charge erroneously failed to include a jury unanimity instruction, the Texarkana Court of Appeals explained:

> [A]lthough the State tried Williams for one offense, it presented evidence of two offenses. The jury charge listed both manners and means, but failed to require the jury to reach a unanimous verdict on the way Williams committed aggravated sexual assault of Alana. "[T]he jury must be instructed that it must unanimously agree on one incident of criminal conduct (or unit of prosecution), based on the evidence, that meets all of the essential elements of the single charged offense beyond a reasonable doubt." In this situation we find the trial court's charge failed to instruct the jury to be unanimous upon which offense they were convicting Williams.

Id. at 856-857.

Both *Ngo* and *Williams* involved indictments that listed multiple ways to commit the same offense, and the case here is different because the indictment listed only one offense. However, because the jury charge (improperly) expanded the indictment to include all separate and distinct forms of prohibited conduct under the indecency-by-contact statute (the subject of another claim on appeal), it not only allowed the jury to convict on an un-indicted offense, but it also allowed a non-unanimous verdict. It did this because the evidence showed multiple theories of the crime of indecency upon which the state relied to prove its case, and the jury charge gave an all-inclusive definition of "sexual contact" for the lesser-included of indecency yet failed to instruct that the jury must be unanimous on which act constitutes the crime for which it was convicting Mr. Hatter.

This case is almost identical to *Gonzalez Soto*. There, the court reversed on jury charge error where the indictment alleged aggravated sexual assault by penetration of the child's mouth and indecency by contact. *Gonzalez Soto v. State*, 267 S.W.3d 327, 337-

38 (Tex. App.—Corpus Christi-Edinburg 2008, no pet., reh'g overruled). The evidence in *Gonzalez Soto* showed multiple instances of different types of conduct the jury could have found to constitute indecency. *Id.* at 338. The State argued to the jury, "So if you find . . . that he made her touch part of his genitals, then you will [] find him guilty of indecency with a child, or that he touched her breasts or that she touched any part of his genitals, *either one of these*." *Ibid.* (emphasis in original). The jury charge there included only the boilerplate unanimity instruction, and the court held it was "insufficient to mitigate the harm caused by the prosecutor's confusing and erroneous argument." *Ibid.* There is no material difference between *Gonzalez Soto* and Mr. Hatter's case. *See also Pizzo v. State*, 235 S.W.3d 711, 718-719 (Tex. Crim. App. 2007) (Section 22.01 regarding indecency "criminalizes three separate types of conduct" necessitating juror unanimity "as to the commission of any one of these acts").

Therefore, it was error to omit a jury instruction that the jury had to be unanimous on which event constituted the crime. *See Ngo*, 175 S.W.3d at 745.

ii. Egregious Harm

The standard for egregious harm is briefed in Issue I and is incorporated here by reference. *Supra* at 9, 13.

Jury Charge as a Whole

This error was amplified as progeny of the above-briefed jury charge error. *See supra*, Issue I, at 7-16. Because the jury charge instructed the jury on an all-inclusive definition of indecency, and the evidence manifested multiple alleged potential

incidences of conduct under that inclusive definition, the lack of an unanimity instruction was harmful. *Williams*, 474 S.W.3d at 852-53.

Additionally, the right to notice of a criminal charge against a person and the right to a unanimous verdict are fundamentally important due process rights enshrined in both state and federal law. U.S. CONST. amend. VI; TEX. CONST. arts. I, § 10, 15; *Ramos*, 590 U.S. at 100; *Randel*, 219 S.W.2d at 698; *Ngo,* 175 S.W.3d at 750.

State of the Evidence

The State presented evidence of several purported acts that could be found to fit under the umbrella of indecency by contact, compounding the harm. (4R.R. 60-67, 183-86, 241-58; 8R.R. St. Exs. 1-5).

To preface, two years after what was alleged to have been the shower incident, the complainant was alleged to have exposed himself to his younger niece and "asked her to put his penis in her mouth." (8R.R. 13, St. Ex. 3). The complainant's mother made some sort of report to Child Protective Services. (4R.R. 63). The complainant's mother testified that the complainant had exposed himself to his sister's young child (the complainant's niece). (4R.R. 67). The complainant then claimed that Mr. Hatter had assaulted him on his mouth and his "backside" in a structured interview with the Children's Assessment Center around that time. (8R.R. St. Ex. 3).

At trial, the complainant testified his mouth had come into contact with Mr. Hatter's sexual organ but did not testify about any touching on the anal region. However, the interview and report from the CAC reflected that the complainant had

reported his father "forced [him] to perform oral sex and various other sexual acts." (8R.R. 13, St. Exs. 3, 5). He stated his father touched him with his hands, his mouth, and his private area on the complainant's "private area" and "backside." (8R.R. 14, St. Ex. 3). He alleged it happened "more than once." *Id.* Though this more expansive account of multiple alleged incidents was not reflected in the complainant's testimony at trial, it was contained in two major pieces of evidence highlighted by the State. (8R.R. St. Exs. 3, 5).

When the evidence in a case manifests multiple potential instances of conduct, it creates an unanimity issue. *Cosio*, 353 S.W.3d at 772 ("[N]on-unanimity may occur when the State charges one offense and presents evidence that the defendant committed [that] offense on multiple separate occasions" or when "the State charges one offense and presents evidence of an offense, committed at a different time, that violated a different provision of the same criminal statute"). And because the jury charge's definition of indecency included each separate offense under the indecency statute—expanding on what the indictment charged—the lack of unanimity instruction allowed some jurors to convict, for example, on contact with the anus and some to convict on contact with the mouth. Because the state of the evidence in combination with the jury charge error in Issue I and the lack of an unanimity instruction allowed the jury to render a non-unanimous verdict, this factor weighs in favor of finding actual egregious harm.

Arguments of Counsel

As for counsels' arguments, the State informed the jury it could simply pick whatever act it wanted that it felt met the elements of an indecency offense. (6R.R. 101). It even stated, "I know you've heard some evidence about lots of different sexual acts." (C.R. 100). Though it clarified the jury must unanimously agree whether Mr. Hatter's sexual organ went "into that boy's mouth" regarding aggravated sexual assault, it distinguished indecency from this explanation and stated, "Indecency by contact is if that man's penis touches anywhere on [the complainant's] body, including the mouth, face, hands, anus." (C.R. 101). This reflected the erroneous instruction in the jury charge, and Mr. Hatter was convicted of indecency, which is the offense for which the unanimity issue applies.

The State's argument in combination with the jury charge as a whole—and against the backdrop of a mosaic of statements regarding multiple instances of Mr. Hatter's purported conduct—ensured this charge error would egregiously harm Mr. Hatter. Because the jury charge both instructed on an all-inclusive definition of indecency and then omitted an instruction that the jury must unanimously agree on what event would constitute the lesser-included offense, and because Mr. Hatter was indeed convicted on that lesser-included offense, there was egregious harm. This Court should reverse and remand for a new trial.

Issue III: The amended indictment violated Appellant's right to be indicted by a grand jury under Article I, Section 10 of the Texas Constitution, as it alleged a different statutory offense than the original indictment and was not reviewed for probable cause by a grand jury. The judgment is therefore void.

A. Applicable Law

"The Texas Constitution guarantees to defendants the right to indictment by a grand jury for all felony offenses." *Riney v. State*, 28 S.W.3d 561, 564-565 (Tex. Crim. App. 2000), citing *Cook v. State*, 902 S.W.2d 471, 475 (Tex. Crim. App. 1995) and TEX. CONST. art. I, § 10 ("no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury…"). *See also Duron v. State*, 956 S.W.2d 547, 550 (Tex. Crim. App. 1997) ("Under art. 1, § 10, a defendant has the right to have a grand jury pass upon the question of whether there is probable cause to believe that he committed a particular offense."). "Article V, section 12 of the Texas Constitution defines an indictment as 'a written instrument presented to a court by a grand jury charging a person with commission of an offense.'" *Henderson v. State*, 526 S.W.3d 818, 819 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (op. on reh'g).

A person commits the offense of aggravated sexual assault of a child if he intentionally or knowingly (1) causes the penetration of the anus or sexual organ of a child by any means; (2) causes the penetration of the mouth of a child by the sexual organ of the actor; (3) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; (4) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the

actor; (5) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; of a child younger than 14 years of age. TEX. PENAL CODE § 22.021(a)(1)(B)(i-v), (a)(2)(B).

B. Analysis

Appellant's trial counsel offered no objection to the amended indictment. However, "[t]he right to a grand jury indictment under state law is a waivable right, which 'must be implemented by the system unless expressly waived.'" *Woodward v. State*, 322 S.W.3d 648, 657 (Tex. Crim. App. 2010), citing *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) and *Trejo v. State*, 280 S.W.3d 258, 263 (Tex. Crim. App. 2009) (Keller, P.J., concurring) ("unless waived, an indictment is necessary to vest the trial court with personal jurisdiction in a felony case"). The Court of Criminal Appeals has "held that a defendant's art. 1, § 10 rights to a grand jury indictment are not forfeited by the failure to object." *Duron*, 956 S.W.2d at 551 n. 2, citing *King v. State*, 473 S.W.2d 43 (Tex. Crim. App. 1971). As a result, this right is classified as non-forfeitable and the deprivation of Mr. Hatter's right to a grand jury here can be raised for the first time on appeal. This issue is not raised under the Texas Code of Criminal Procedure art. 28.10 (amending indictments), a state law which is at issue in another claim raised *infra*.

Under the original indictment, Mr. Hatter was alleged to have committed aggravated sexual assault by penetrating the complainant's anus. (C.R. 37, 285-87). The State's motion to amend the indictment was granted, the amended indictment alleging that Mr. Hatter penetrated the complainant's mouth with Mr. Hatter's sexual organ.

(C.R. 37, 285-87). The allegation in the original indictment is an offense under Texas Penal Code § 22.021(a)(1)(B)(i). The amended indictment alleges an offense under Texas Penal Code § 22.021(a)(1)(B)(ii). These are separate offenses, and not mere manner and means: the Court of Criminal Appeals "conclude[d] that the Legislature intended that each separately described conduct [in the aggravated sexual assault of a child statute] constitutes a separate statutory offense." *Vick*, 991 S.W.2d at 833. In other words, the aggravated sexual assault of a child statute includes separate and distinct offenses that must be treated as such, even though they are contained within single statute.

As a result, the amended indictment that changed the allegations from one of penetration of the child's anus to penetration of the child's mouth with the actor's sexual organ alleges a different statutory offense from the original indictment. The Court of Criminal Appeals's holding in *Vick* that "each separately described conduct [under Texas Penal Code§22.021(a)(1)(B)] constitutes a separate statutory offense" was released in 1999 and has been consistently reaffirmed by the Court of Criminal Appeals. *E.g. Jourdan v. State*, 428 S.W.3d 86, 95 (Tex. Crim. App. 2014) ("In *Vick*, we held that allegations of aggravated sexual assault under different subsections of Section 22.021(a)(1)(B) of the Penal Code constituted discrete statutorily defined offenses[.]"); *Aekins v. State*, 447 S.W.3d 270, 286 (Tex. Crim. App. 2014) ("We have later cited *Vick* and other sex-offense cases as formulating a general rule, with respect to sexual offenses, 'that different types of conduct specified in various statutes be treated as

separate offenses.'"); and *Gonzales v. State*, 304 S.W.3d 838, 847-848 (Tex. Crim. App. 2010) (different types of conduct proscribed within the same subsection were different offenses under Penal Code § 22.021).

The amended indictment in this case alleges an offense that is distinct and separate from the offense alleged in the original indictment. The offense alleged in the original was the offense indicted by a grand jury, but Mr. Hatter was tried on an offense that never was put before the grand jury, violating his constitutional right. If each specific subsection of the aggravated sexual assault of a child statute was the same statutory offense, the State could amend an indictment, with or without an objection, interchanging the various separate different conduct specified within the five subsections at will. To allow this would run afoul of the statutory intent of the Legislature "that each separately described conduct constitutes a separate statutory offense" as described in *Vick*. To allow this would permit the State to amend indictments interchanging different statutory offenses and bypass the constitutional requirement that a grand jury render an indictment based upon a belief of probable cause. And again, the constitutional right to a grand jury indictment is not forfeitable, as explained *supra*. "A person represented by legal counsel may in open court or by written instrument voluntarily waive the right to be accused by indictment of any offense other than a capital felony." TEX. CODE CRIM. PRO. art. 1.141.

Based on the foregoing, Mr. Hatter was deprived of his right under Article I, Section 10 of the Texas Constitution to have a grand jury return an indictment based on probable cause.

C. Harm

The judgment in this case is void due to it being based on a conviction under an invalid indictment; in fact, the "amended indictment" in this case is not an indictment at all. This Court has recognized that an "indictment" is defined as "a written instrument presented to a court by a grand jury charging a person with the commission of an offense." *See Rodriguez v. State*, 491 S.W.3d 18, 24-25 (Tex. App.—Houston 2016, reh'g overruled, pet. ref'd). Without the return of a valid indictment by a grand jury, the trial court had no jurisdiction. *See King*, 473 S.W.2d at 52 ("If an accused has not effectively waived his right to an indictment in full accordance with the statute the felony information is void."). "Judgment which court is without jurisdiction to render is void." *Gallagher v. State*, 690 S.W.2d 587, 589 n. 1 (Tex. Crim. App. 1985), *superseded by constitutional provision,* TEX. CONST. ART. 5, § 8, *as recognized in Roland v. State*, 631 S.W.3d 125, 127-128 (Tex. Crim. App. 2021). "A void judgment is a nullity from the beginning, and is attended by none of the consequences of a valid judgment." *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001). "It is entitled to no respect whatsoever because it does not affect, impair, or create legal rights." *Id.* As a result, the conviction here is void, and the judgment must be vacated and dismissed. *See* TEX. R. APP. P. 43.2(e) (court of appeals may "vacate the trial court's judgment and dismiss the case.").

Alternatively, if this court determines the judgment here is not technically void, it should perform a harm analysis under TEX. R. APP. P. 44.2(a). "Constitutional error is harmful unless a reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction." *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020), citing TEX. R. APP. P. 44.2(a). "While the rule does not expressly place a burden on any party, the 'default' is to reverse unless harmlessness is shown." *Merrit v. State*, 982 S.W.2d 634, 636 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). "The State has the burden, as the beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard*, 612 S.W.3d at 328, citing *Deck v. Missouri*, 544 U.S. 622, 635 (2005) and *Wall v. State*, 184 S.W.3d 730, 746 n.53 (Tex. Crim. App. 2006).

The deprivation of Mr. Hatter's right under Article I, Section 10 of the Texas Constitution to have a grand jury determine whether there was probable cause to believe he had committed the allegation in the amended indictment was not harmless beyond a reasonable doubt. The erroneously amended indictment directly contributed to Mr. Hatter's conviction because that was the offense on which the jury was instructed. (C.R. 417-18). The jury obviously struggled with the allegations given that it convicted Mr. Hatter of a lesser offense. (C.R. 423-24). Further, the State clearly struggled with the allegations in the original indictment as evidenced by its effort to supplant it with what it thought was a stronger allegation, and Mr. Hatter likely would have also been acquitted of the original indicted offense. The evidence in this case was inconsistent: the complainant's Children's Assessment Center records reflected a statement that Mr.

Hatter's penis went in the complainant's mouth and "backside", but the complainant did not testify to the latter. (8R.R. St. Ex. 3). And after explaining the alleged shower incident, the complainant changed tune and said he did not remember when asked, "So all you remember was that your dad put his penis in your mouth, correct?" then testifying that more did happen. (4R.R. 258-59). There was a credibility issue with the complainant not just because of the inconsistencies, but also because his accusation arose two years after the alleged incident and only when the complainant himself was accused of sexually abusing his young niece. (8R.R. St. Ex. 3 at 13 of R.R.). This would give him a motivation to pass the blame for his behavior.

Therefore, the deprivation of Mr. Hatter's right under Article I, Section 10 of the Texas Constitution to have a grand jury return an indictment based upon a determination of probable cause was not harmless beyond a reasonable doubt. This Court must therefore vacate Mr. Hatter's conviction in this case.

Issue IV: Defense counsel was ineffective in failing to object to the State's motion to amend the indictment under Texas Code of Criminal Procedure § 28.10. The amended indictment violated Appellant's right to be indicted by a grand jury under Article I, Section 10 of the Texas Constitution because it alleged a different statutory offense from the original indictment that was not reviewed for probable cause by a grand jury.

The original indictment signed by the grand jury alleged that Mr. Hatter caused the penetration of the child's anus with his sexual organ. (C.R. 37, 285-87). The State moved to amend the indictment to allege that Mr. Hatter did "intentionally and knowingly cause the penetration of the mouth of [the complainant], a person younger

than fourteen years of age, with the sexual organ of the Defendant." (C.R. 37, 285-87). The motion to amend was granted without recorded objection from defense counsel.

A. Standard of Review

To prevail on a claim of ineffective assistance of counsel, 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 for failure to object, one must show the trial court would have erred in "overruling such objection." *Ex parte Parra*, 420 S.W.3d 821, 824-25 (Tex. Crim. App. 2013); *see also McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992).

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).

However, Texas Courts of Appeals have found both *Strickland* prongs from only the cold record in some cases. *E.g.*, *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); *Morrison v. State*, 575 S.W.3d 1, 26 (Tex. App. – Texarkana 2019, no pet.) (holding defense counsel was ineffective for disclosing confidential communications).

B. Applicable Law

"The Texas Constitution guarantees to defendants the right to indictment by a grand jury for all felony offenses." *Riney v. State*, 28 S.W.3d 561, 564-565 (Tex. Crim. App. 2000), citing *Cook v. State*, 902 S.W.2d 471, 475 (Tex. Crim. App. 1995) and TEX. CONST. art. I, § 10 ("no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury…"). "Article V, section 12 of the Texas Constitution defines an indictment as 'a written instrument presented to a court by a grand jury charging a person with commission of an offense.'" *Henderson v. State*, 526 S.W.3d 818, 819 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (op. on reh'g). For the sake of brevity, the law applicable to Mr. Hatter's right to a grand jury indictment is more fully briefed in Issue III, *supra* pp. 27-34 and is incorporated here by reference.

"Under article 28.10(c) of the Code of Criminal Procedure, an indictment may not be amended over the defendant's objection as to form or substance if the amended indictment charges the defendant with an additional or different offense." *Marks v. State*, 525 S.W.3d 403, 409 (Tex. App.—Houston [14th Dist.] 2017), *aff'd*, 560 S.W.3d 169 (Tex. Crim. App. 2018); TEX. CODE CRIM. PRO. art. 28.10(c). "A 'different offense' means a different statutory offense." *Id.* at 412, citing *Flowers v. State*, 815 S.W.2d 724, 725 (Tex. Crim. App. 1991). "An amended indictment does not charge the defendant

with a different offense if the amendment alters an element of the offense charged, or adds a matter to be proved that is not an essential element of the offense, or changes the name of the complainant." *Id.*, citing *Flowers*, 815 S.W.2d at 727-729 & *Brown v. State*, 155 S.W.3d 625, 628 (Tex. App.—Fort Worth 2004, pet. ref'd).

Texas Penal Code § 22.021(a)(1)(B) describes five discrete acts which constitute the allowable units of prosecution for aggravated sexual assault where the victim is a child. *See Nickerson v. State*, 69 S.W.3d 661, 671 (Tex. App.—Waco 2002, pet. ref'd). A person commits the offense of aggravated sexual assault of a child if he intentionally or knowingly (1) causes the penetration of the anus or sexual organ of a child by any means; (2) causes the penetration of the mouth of a child by the sexual organ of the actor; (3) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; (4) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; (5) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; of a child younger than 14 years of age. TEX. PENAL CODE § 22.021(a)(1)(B)(i-v), (a)(2)(B).

"Article 22.021 is a conduct-oriented offense in which the legislature criminalized very specific conduct of several different types." *Vick*, 991 S.W.2d at 832. "Also, the statute expressly and impliedly separates the section by 'or,' which is some indication that any one of the proscribed conduct provisions constitutes an offense." *Id.* at 832-833. The Court of Criminal Appeals has "conclude[d] that the Legislature intended that

each separately described conduct [in the aggravated sexual assault of a child statute] constitutes a separate statutory offense." *Id.* at 833.

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).

C. Analysis

i. Trial counsel's performance was deficient.

"Counsel's performance is deficient when his representation falls below an objective standard of reasonableness." *Cueva v. State*, 339 S.W.3d 839, 857-858 (Tex. App.—Corpus Christi – Edinburg 2011, pet. ref'd), citing *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005) and *Strickland*, 466 U.S. at 687-688. "In determining whether there is a deficiency, we afford great deference to trial counsel's ability, indulging 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and that counsel's actions were the result of sound and reasonable trial strategy." *Id.* at 858, citing *Strickland*, 466 U.S. at 689 & *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App.—Corpus Christi – Edinburg 2006, no pet.).

"[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *State v. Morales*, 253 S.W.3d 686, 697-698 (Tex. Crim. App. 2008).

The record is devoid of any objection by trial counsel to the State's motions to amend the indictment. Article 28.10(c) of the Texas Code of Criminal Procedure provides than an indictment or information may not be amended over the defendant's objection if the amended indictment charges an additional or different offense. For purposes of Article 28.10(c), a "different offense" means a different statutory offense. *Flowers*, 815 S.W.2d at 728-729. The amended indictment here charged Mr. Hatter with a different statutory offense under the reasoning of the Court of Criminal Appeals's decision in *Vick* and its progeny. The original indictment alleged an offense pursuant to Texas Penal Code § 22.021(a)(1)(B)(i) (penetration of a child's anus). However, the amended indictment alleged an offense under Texas Penal Code § 22.021(a)(1)(B)(ii) (penetration of the mouth of a child by the sexual organ of the actor).

In *Vick*, the Court of Criminal Appeals "conclude[d] that the Legislature intended that each separately described conduct [in the aggravated sexual assault of a child statute] constitutes a separate statutory offense." *Vick*, 991 S.W.2d at 833. In other words, the aggravated sexual assault of a child statute includes separate and distinct offenses that must be treated as such, even though they are contained within single

statute. As a result, the amended indictment that changed the allegations from one of penetration of the child's anus to penetration of the child's mouth with the actor's sexual organ are different statutory offenses from the original indictment for purposes of Article 28.10(c). *E.g. Jourdan*, 428 S.W.3d at 95 ("In *Vick*, we held that allegations of aggravated sexual assault under different subsections of Section 22.021(a)(1)(B) of the Penal Code constituted discrete statutorily defined offenses[.]"); *Aekins v. State*, 447 S.W.3d 270, 286 (Tex. Crim. App. 2014) ("We have later cited *Vick* and other sex-offense cases as formulating a general rule, with respect to sexual offenses, 'that different types of conduct specified in various statutes be treated as separate offenses.'"); *Gonzales v. State*, 304 S.W.3d 838, 847-848 (Tex. Crim. App. 2010) (different types of conduct proscribed within the same subsection were different offenses under Penal Code § 22.021).

The law regarding the separate subsections of Texas Penal Code § 22.021(a)(1)(B) being different statutory offenses is well-settled and trial counsel should have objected to the amended indictment; there is no conceivable strategic reason in this case to not have done so and it was objectively unreasonable. *See Jefferson v. State*, 663 S.W.3d 758, 764 (Tex. Crim. App. 2022) (indicating it can be deficient performance for trial counsel to fail to object to the amendment of an indictment). In *Jefferson* on remand, the Eastland Court of Appeals vacated convictions for offenses that appeared on an un-objected to and improperly amended indictment, holding that trial counsel was ineffective for failing to object to the amendment. *Jefferson v. State*, 695 S.W.3d 23,

25-30 (Tex. App.—Eastland 2024, pet. filed). Originally, that court had "surmised that trial counsel might not have wanted to oppose a requested amendment of the indictment to avoid an unnecessary delay of the trial." *Id.* at 29. However, it changed its position on remand: whether it was because counsel failed to object or failed to memorialize the objection, the court concluded "that counsel's representation fell below an objective standard of reasonableness and therefore constituted deficient performance. . . ." *Id.* at 29. Even though in some cases in can be conceivable that there was a strategic reason for a failure of counsel to take a certain action, it can still be objectively unreasonable, as in cases like *Jefferson* and Mr. Hatter's. Therefore, trial counsel's performance was constitutionally deficient.

ii. Counsel's deficient performance was prejudicial.

To show prejudice in an ineffective assistance claim for failure to object, one must show the trial court would have erred in "overruling such objection." *Ex parte Parra*, 420 S.W.3d 821, 824-25 (Tex. Crim. App. 2013); *see also McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992) (to show prejudice, one must show the result would have been different).

The original indictment alleged an offense pursuant to Texas Penal Code § 22.021(a)(1)(B)(i) (penetration of the anus of a child by Mr. Hatter's sexual organ). However, the amended indictment alleged an offense pursuant to Texas Penal Code § 22.021(a)(1)(B)(ii) (penetration of child's mouth by Mr. Hatter's sexual organ). In *Vick*, the Court of Criminal Appeals "conclude[d] that the Legislature intended that each

separately described conduct [in the aggravated sexual assault of a child statute] constitutes a separate statutory offense." *Vick*, 991 S.W.2d at 833.

In other words, the aggravated sexual assault of a child statute includes separate and distinct offenses that must be treated as such, even though they are contained within a single statute. The amended indictment charged a "different offense" than the original indictment. TEX. CODE CRIM. PRO. art. 28.10(c); *Marks*, 525 S.W.3d at 409 ("[A]n indictment may not be amended over the defendant's objection as to form or substance if the amended indictment charges the defendant with an additional or different offense."). As a result, Mr. Hatter was deprived of his right under Article I, Section 10 of the Texas Constitution to have a grand jury determine whether there was probable cause to believe he committed the allegations in the amended indictment, allegations that were different statutory offenses from the allegations set forth in the original indictments. *See Jourdan*, 428 S.W.3d at 97.

Though *Vick* regarded a double jeopardy issue, the Court of Appeals determined the aggravated sexual assault statute contains several separate offenses:

> The statute criminalizes many types of sexually assaultive conduct with a child. Yet, each section usually entails different and separate acts to commit the various, prohibited conduct. This specificity reflects the legislature's intent to separately and distinctly criminalize any act which constitutes the proscribed conduct. An offense is complete when a person commits any one of the proscribed acts. In sum, Art. 22.021 is a conduct oriented statute; it uses the conjunctive 'or' to distinguish and separate different conduct; and its various sections specifically define sexual conduct in ways that usually require different and distinct acts to commit. *These considerations lead us to conclude that the Legislature intended that each separately described conduct constitutes a separate statutory offense.*

Vick, 991 S.W.2d at 833 (emphasis added); *see also Pizzo v. State*, 235 S.W.3d 711, 717 (Tex. Crim. App. 2007) ("Looking at the statutory text of subsections (i)-(iv), [the Court] recognized that (i) and (ii) 'concern penetration of the child, one focusing on the genital area, and the other on the mouth[,]' while (iii) and (iv) concern 'penetration and contact of another in a sexual fashion by the sexual organ or anus of the child.'"), quoting *Vick*, 991 S.W.2d at 833.

If each specific subsection of the aggravated sexual assault of a child statute was the same statutory offense, the State could amend an indictment, with or without an objection, interchanging the various separate different conduct specified within the five subsections at will. To allow this would run afoul of the statutory intent of the Legislature "that each separately described conduct constitutes a separate statutory offense" as described by the Texas Court of Criminal Appeals in *Vick*.

In addition, to allow this would permit the State to amend indictments to interchange different statutory offenses and bypass the constitutional requirement that a grand jury render an indictment based upon a belief of probable cause. The allegation in the amended indictment that Mr. Hatter penetrated the mouth of the complainant with his sexual organ was not presented to a grand jury. If counsel had objected to the State's motion to amend the indictment to this offense—one that is distinct and separate than the one in the original indictment—it would have been error for the trial court to allow the amendment both under the Texas Code of Criminal Procedure and

under the Texas Constitution. TEX. CONST. art. I, § 10; TEX. CODE CRIM. PRO. art. 28.10. The amended charge was substituted by the District Attorney's Office for the original charge without authorization from the grand jury. Without the return of a valid indictment, the trial court had no jurisdiction over the cause as amended. See *King*, 473 S.W.2d at 52 ("If an accused has not effectively waived his right to an indictment in full accordance with the statute the felony information is void.").

"Judgment which court is without jurisdiction to render is void." *Gallagher v. State*, 690 S.W.2d 587, 589 n. 1 (Tex. Crim. App. 1985), *superseded by constitutional provision,* TEX. CONST. art. 5, § 8, *as recognized in Roland v. State*, 631 S.W.3d 125, 127-128 (Tex. Crim. App. 2021). "A void judgment is a nullity from the beginning, and is attended by none of the consequences of a valid judgment." *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001). "It is entitled to no respect whatsoever because it does not affect, impair, or create legal rights." *Id.*

In sum, trial counsel's failure to object to the amended indictments violated Appellant's right to be indicted by a grand jury under Article I, Section 10 of the Texas Constitution and objection to the amendment would have had to be sustained under the Texas Code of Criminal Procedure article 28.10. As a result, trial counsel's deficient performance caused Appellant to suffer prejudice, i.e. that there was "a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceedings would have been different." *See Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009). Therefore, this case must be reversed and remanded.

PRAYER

Appellant, Daryl Hatter, prays that this Court reverse the lower court's judgment and remand this case for a new trial. Mr. Hatter also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served to the Harris County District Attorney's Office on December 16, 2024.

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CERTIFICATE OF COMPLIANCE

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