No. 01-24-00546-CR

# In the Court of Appeals for the First District



**State of Texas,**

***Appellant*,**

**v.**

**Dionate D. Banks,**

***Appellee*.**

On Appeal from the
209th Judicial District Court of Harris County, Texas
Trial Cause No. 178326901010

## APPELLEE'S BRIEF

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**ORAL ARGUMENT REQUESTED**

## I. Identity of Parties and Counsel

Dionate D. Banks provides the following complete list of all parties of the trial court's judgment or order appealed from, except as otherwise provided in Rule 9.8 of the Texas Rules of Appellate Procedure:

| | |
|---|---|
| State of Texas | *Appellant* |
| Dionate D. Banks | *Appellee* |

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## IV. Statement of the Case

Dionate Banks was convicted of murder following a trial by jury. C.R. 260-62. The jury assessed a punishment of imprisonment for 63 years. 10 R.R. 19-20 (Trial on the Merits and Punishment). Banks filed a motion for new trial, which the trial court granted. C.R. 268-75, 334. The State of Texas appeals the trial court's order granting Banks' motion for new trial. *Id*. at 338-40.

## V. Statement Regarding Oral Argument

Oral argument should be granted because there are relatively few cases where trial courts grant new trials in criminal cases, and even fewer where the State's waiver of pleading-related objections is a potentially dispositive issue. Ineffective assistance of counsel cases require an analysis of unique, and often dissimilar facts. The Court's decisional process would be aided by oral argument because oral argument is an ideal forum for arguing in fuller depth: (a) how the State's brief runs afoul of the "almost total deference" to the trial court that Kober v. State, 988 S.W.2d 230 (Tex. Crim. App. 1999), requires under these circumstances; (b) how and why the totality of the evidence in the case at bar supports a finding of ineffective assistance of counsel; and (c) how and why State v. Zalman, 400 S.W.3d 590 (Tex. Crim. App. 2013), is distinguishable from the case at bar, among other things.

## VI. Issues Presented

**Issue 1.**

The trial court acted within its discretion when it granted Banks' motion for new trial. Banks demonstrated that Frank's errors and omissions prejudiced Banks during both the guilt-innocence phase and the punishment phase of Banks' trial, satisfying the requirements of Strickland.

## VII. Statement of Facts

**(Background)**

Dionate D. Banks was indicted for the murder of Gregory Shead and later convicted on April 11, 2024, following a jury trial. C.R. 33, 260-62; 8 R.R. 1, 33 (Trial on the Merits and Punishment) [2] [3] The following day, the jury assessed a punishment of imprisonment for 63 years. 10 R.R. 19-20 (Trial on the Merits and Punishment). Judgment was rendered on the verdict. C.R. 260-62. Banks was represented by Jonathan Frank. *Id*.

Banks filed his "Motion for New Trial and/or Motion for New Trial on Punishment" on May 7, 2024. C.R. 268-75. [4] Banks' motion for new trial sought a new trial on guilt-innocence in the first alternative, citing ineffective assistance of counsel by Frank. *Id*. at 268-70. Banks' motion for new trial on punishment was also predicated on ineffective assistance of counsel by Frank. *Id*. at 271-72.

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[2] Shead is referred to herein as "the Complainant."

[3] There are two reporter's records filed in this appeal: one for on the merits and punishment, and one for the oral hearing on Banks' motion for new trial.

[4] This filing is referred to herein singularly as "Banks' motion for new trial."

Banks' motion for new trial is a verified, 7-page filing that chronicles Frank's deficient performance. C.R. 268-75. It contains a list of nine enumerated deficiencies, including Frank's failure to compel the testimony of Odyssey Blackmore, the person that Banks was defending during the incident in question. *Id*. at 270. Banks' motion for new trial also complained of Frank's failure obtain Odyssey Blackmore's medical records, Frank's terse 16-minute voir dire examination, and Frank's failure to meet with Banks and prepare for trial. *Id*. at 270.

Banks' motion for new trial complains of Frank's failure to prepare Banks to testify during the guilt-innocence phase of trial, Frank's failure to hire a mitigation expert, and Frank's failure to hire an investigator. C.R. 270. It also complains of Frank's failure to file a timely election as to punishment prior to voir dire, and Frank's failure to interview all on-scene witnesses. *Id*. at 270. The language of Banks' motion for new trial left open other factual bases for relief. *See id*. at *Id*. at 270 ("but not limited to").

The trial court held an oral hearing on Banks' motion for new trial, which began on June 14, 2024. 2 R.R. 1 (Motion for New Trial). Banks testified that Banks knew Frank from a nightclub. *Id*. at 9. While there

is some discrepancy about where Banks and Frank first "met" within the professional sense of the word, it is clear from the record that Banks and Frank never met at an office. *See id*. at 9-10, 24, 26. Banks testified that Banks did not know whether Frank had an office. *See id*. at 9-10.

Frank represented to Banks that Frank "had beat a lot of murder cases and ... recently got some dismissed." 2 R.R. 10 (Motion for New Trial). Frank told Banks that Banks "had the right to use self-defense in certain situations" and that Banks "had the right to use self-defense of others in this situation." *Id*. at 11. Banks and Frank discussed how Odyssey Blackmore could have suffered death. *Id*. at 12, 14.

**1. Frank failed to compel the testimony of Odyssey Blackmore, the person that Banks was defending during the incident in question.**

During the hearing on Banks' motion for new trial, Blackmore testified that Blackmore suffered "two black eyes," a fractured nose, a "knot" on the head, and required medical imaging. 2 R.R. 52 (Motion for New Trial). During Frank's direct examination, Banks' counsel suggested to Frank that "if a person receives a fractured nose the way that [Blackmore] did … there's a possibility that they might die[.]" *See id*. at 87. Frank admitted that Frank did not hire an expert to explore that

possibility. *See id*. In fact, Frank admitted that Frank did not contact a single expert in Banks' case. *See id*.

During the oral hearing on Banks' motion for new trial, Blackmore testified about the events of August 14, 2022. 2 R.R. 48 (Motion for New Trial). She recalled that there was "some kind of event where everybody was fighting." *Id*. at 49. Blackmore testified that she fought with other women that night. *Id*. at 54. She testified that she did not "[throw] the first punch," but she recalled that she was punched by a woman with bright-colored hair, who was tall and had light skin. *Id*. at 54-55.

Frank did not interview Blackmore in person. 2 R.R. 50 (Motion for New Trial). Frank did not send an investigator to interview Blackmore. *See id*. at 51. Blackmore testified that Blackmore spoke to Frank and sent Frank a statement. *Id*. at 49-50. [5]

Blackmore testified that Frank requested Blackmore's medical records, but that Blackmore "could not" provide them for legal reasons. 2 R.R. 50 (Motion for New Trial). Blackmore testified that Blackmore did not give Frank specific information about her primary care provider, and

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[5] This conversation presumably occurred by telephone, but the word "telephone" does not appear in the record.

that Frank did not ask for it, instead requesting a release. *See id*. at 50-51. Blackmore testified that if Frank had asked for information about where Blackmore sought treatment, Blackmore would have been willing to provide that information to Frank. *Id*. at 53.

Frank later admitted that he did not subpoena anyone for Banks' trial. 2 R.R. 109 (Motion for New Trial). Blackmore confirmed that she did not receive a bench warrant or a subpoena to testify on behalf of Banks. *Id*. at 51. Blackmore testified that Blackmore would have been willing to testify on Banks' behalf. *Id*. at 51-52. When Banks asked Frank why Frank did not subpoena Blackmore, Frank told Banks that they did not need Blackmore. *Id*. at 25.

***2.*** **Frank failed to obtain Odyssey Blackmore's medical records.**

Banks was aware of the injuries that Blackmore sustained. 2 R.R. 14 (Motion for New Trial). Those injuries included a "busted lip" and a "swollen face[.]" *Id*. Frank did not request or subpoena Blackmore's medical records. *Id*. Blackmore's medical records were not introduced into evidence at trial. *Id*. at 15.

### 3. Frank conducted a 16-minute voir dire examination.

During voir dire, Banks observed that Frank did not have notes. 2 R.R. 19 (Motion for New Trial). Banks described Frank's approach as "freestyling." *Id*. The defense's voir dire in Banks' murder case lasted approximately 16 minutes. *Id.* at 20. During opening statements, Banks again noted that Frank did not have notes. *Id*. Banks did not see a trial notebook at any point during trial. *Id*. at 20-21.

### 4. Frank failed to meet with Banks and prepare for trial.

Banks was accused of bond violations and detained for nine months preceding trial. 2 R.R. 13 (Motion for New Trial). During that period, Banks testified Frank never visited Banks. *Id*. Banks viewed a video of the alleged murder once on FaceTime while Banks was in a car. *Id*. [6]

Banks testified that Banks asked Frank "for all of the evidence" several times, and to visit Banks in jail several times. 2 R.R. 38 (Motion for New Trial). Banks clarified that, while Banks viewed a video over FaceTime with Frank, Banks did not review *all* the evidence with Frank.

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[6] While it is not entirely clear from the record, viewing a video in a car must have necessarily occurred before Banks' pretrial detention.

*Id*. at 37. Banks called witnesses from the jail and asked them to reach out to Frank. *Id*. at 34-35.

Frank contradicted Banks, alleging that Frank had visited Banks but did not keep a record of those visits. 2 R.R. 91-92 (Motion for New Trial). Frank could not testify to the number of times that Frank had visited Banks. *Id*. There is no explanation elsewhere in the record why Frank, a privately retained defense attorney, did not keep a record of Frank's alleged jail visits or Frank's time.

There is evidence in the record that the video does not show all the events of August 14, 2022. *Infra*. Although the State suggested that the video was clear and shows the entire shooting, the trial court commented that, "there is a car that does block some of that video." 2 R.R. 38 (Motion for New Trial). Banks also disagreed with the State's suggestion that the video was clear and shows the entire shooting. *Id*. at 37.

During cross-examination of the officers at trial, Banks again observed that Frank did not have any notes. 2 R.R. 21 (Motion for New Trial). When asked about cross-examination of the officers Banks explained, "It went fast ... like [Frank] didn't even want to ask them any questions." *Id*. at 21. Apart from their initial meeting and viewing a video

depicting only part of the events in question, there is no evidence in the record that Frank engaged in any meaningful trial preparation with Banks.

**5. Frank failed to prepare Banks to testify during the guilt-innocence phase of trial.**

Banks discovered that Banks was "going to trial" when Banks was called out, after just arriving at court. 2 R.R. 17 (Motion for New Trial). Banks was worried and did not feel "prepared to go to trial." *Id*. Banks voiced Banks' concerns to Frank. *Id*. Banks specifically complained that Banks had not seen Frank while in custody. *Id*.

Banks testified that Frank did not prepare Banks for testimony or cross-examination. 2 R.R. 18 (Motion for New Trial). Banks told Frank that Banks thought Frank should seek a continuance. *Id*. at 19. Frank responded by stating that Frank "was ready to go to trial." *Id*. There is no evidence in the record that Frank attempted to continue the Spring 2024 trial setting.

Banks had the impression that trial "was going terrible" and Banks felt like Banks "had already lost" when the trial started. 2 R.R. 21 (Motion for New Trial). Banks had no idea what questions Frank intended to ask Banks on direct examination and had no idea what

questions the State might ask him during cross-examination. *Id*. Frank described "a haymaker punch" during trial, a term that Banks did not understand. *Id*. at 22.

**6. Frank failed to hire a mitigation expert.**

The punishment phase of Banks' trial lasted approximately 22 minutes. 4 R.R. 24 (Motion for New Trial). Frank did not meet with witnesses prior to the punishment phase of Banks' trial. *Id*. at 24-25. Frank did not meet with Banks to prepare for the punishment phase of Banks' trial. *Id*. at 25.

During the punishment phase of Banks' trial, the defense called three witnesses. 9 R.R. 3 (Trial on the Merits and Punishment). The defense witnesses included Wondera Banks, Banks' mother. *Id*. at 43. Brittany Banks, Banks' sister, also testified. *Id*. at 49. Banks also gave testimony during the punishment phase of trial. *Id*. at 53. The testimony of Banks' punishment witnesses comprises approximately 16 pages of the appellate record, consisting largely of generalizations and platitudes. *See generally id*. at 46, 51, 43-59.

Frank did not undertake "a historical analysis" of Banks' life. 2 R.R. 25 (Motion for New Trial). Frank did not retain or make a request of the

trial court for a mitigation specialist. *Id*. at 93. Frank conceded that it is "important to get experts like that to testify during punishment." *Id*. at 94. Frank also admitted that he did not "conduct any research into getting a psychologist for Mr. Banks[.]" *Id*.

**7. Frank failed to hire an investigator.**

Banks paid Frank money to hire a private investigator, but Banks did not know whether Frank had ever hired a private investigator. 2 R.R. 10-11 (Motion for New Trial). Frank later claimed that Frank did not have the funds to hire an investigator. 3 R.R. 161 (Motion for New Trial). Frank explained, "I didn't get all of my money." *Id*. at 234. However, Frank's claim is inconsistent with other evidence in the record. *Infra*.

The trial court received a thread of text messages into evidence between Frank and Brittany Ross. 3 R.R. 7-8 (Motion for New Trial); *see generally* 5 R.R. Defendant's Ex. 2 1 (Motion for New Trial). [7] During the exchange, Ross announced that Ross obtained a private investigator's license. 3 R.R. 9 (Motion for New Trial). After announcing this, Ross specifically inquired about Banks, referring to Banks on a first name basis. *Id*. Frank responded with, "You're hired." *Id*. However, Frank

[7] This exhibit appears in Adobe Acrobat as page 9 of volume five.

testified that he did not actually hire Ross, and Frank did not request the trial court to appoint an investigator. *Id*. at 9-10, 84-85.

There are facts in the record warranting an investigator. *Infra*. Banks agreed that Blackmore threw the first punch on "the video that shows the actual shooting[.]" 2 R.R. 41 (Motion for New Trial). However, Banks made it clear that "there were other punches thrown that weren't on video." *Id*.

Frank agreed that "no one tracked" witnesses down and asked them any questions[.]" 2 R.R. 85 (Motion for New Trial). Frank was aware of some evidence that the Complainant put his fingers around his girlfriend's neck. *Id*. at 85-86. However, Frank did not send an investigator to "track down" the Complainant's girlfriend, Kimberly Gonzalez, and Frank did not have her interviewed. *Id*. [8]

[8] Gonzalez is referred to herein as "the Complainant's girlfriend."

### 8. Frank failed to file a timely election as to punishment prior to voir dire.

Frank was evasive when he was asked if Frank filed a punishment election the day that testimony started:

> Q. Now, as far as filing an election to punishment prior to voir dire, did you file an election the day that testimony started?
>
> A. Perhaps. I can't remember exactly. I know it was a close call for sure.

3 R.R. 134 (Motion for New Trial). [9] Bank's punishment election is file stamped April 8, 2024. C.R. 208. The reporter's record indicates that voir dire began on May 4, 2024, while the docket sheet indicates that voir dire began on April 5, 2024. 2 R.R. 1 (Trial on the Merits and Punishment); C.R. 349.

### 9. Frank failed to interview all on-scene witnesses.

Frank asserted that Frank spoke to "some witnesses" but that Frank did not record those phone calls or take notes; instead, Frank had the witnesses prepare written statements. 2 R.R. 95 (Motion for New Trial). Frank indicated that Frank did not speak to each author of the

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[9] Banks does not dispute that the jury ultimately assessed punishment: rather, this fact is cited for other reasons, as explained in the argument section of this brief.

three written statements referenced during the oral hearing on Banks' motion for new trial. *Id*. at 96. Frank testified, "I talked to one of them, who sort of served as a facilitator for the other two." *Id*. Frank testified that Frank believed the "facilitator" was Blackmore. *Id*.

**10. The record demonstrates that Frank's performance was deficient.**

***a. Frank failed to present exculpatory and mitigating evidence: testimony from Tyana relating to the Complainant's propensity for domestic violence.***

Frank testified about interactions Frank had with a witness known as Tyana. *See generally* 3 R.R. 19 (Motion for New Trial). Social media messages between Frank and Tyana were introduced into evidence. *Id*. at 20; 5 R.R. Ex. 3 1 (Motion for New Trial). [10] Frank testified that Frank spoke with Tyana over the phone, but Frank denied taking notes. 3 R.R. 24 (Motion for New Trial).

Frank admitted that Tyana told Frank that Tyana and the Complainant "were in a relationship and that there was some sort of domestic violence going on[.]" 3 R.R. 24 (Motion for New Trial). However, Frank did not subpoena Tyana for trial. *Id*. at 25. Frank testified that the

[10] This exhibit appears in Adobe Acrobat as page 12 of volume five.

defense did not offer evidence about the Complainant's propensity for domestic violence during trial. 2 R.R. 109 (Motion for New Trial).

Frank testified that Frank "didn't fight" the State's motion in limine. 3 R.R. 151 (Motion for New Trial); *see* 5 R.R. 9 (Trial on the Merits and Punishment). The order on State's motion in limine included the Complainant's "criminal history, uncharged offenses, and bad actions[.]" C.R. 204. Ultimately, domestic violence was a piercing theme in the State's closing argument:

> … then they were trying to get into this thing that this is akin some type of domestic violence situation where, like, men -- and quite frankly, that's just insulting to any domestic violence victims. Quite frankly, that's insulting to anybody who's been a victim of domestic violence because that is not what this is. We've heard from everybody that [the complaining witness] was trying to deescalate the situation.

8 R.R. 13 (Trial on the Merits and Punishment).

#### *b. Frank told Banks that Banks could "win this." Banks reject a plea offer on Frank's advice.*

Plea bargaining occurred in Banks' case. 2 R.R. 13 (Motion for New Trial). The State extended an offer, which Banks rejected on Frank's advice. *Id*. at 13-14. Banks testified that Banks would have accepted the State's offer had Banks "been advised that the evidence is clear" and that

Banks "did not have the right to use lethal force in defense of a third person or" himself "in this situation[.]" *Id*. at 14.

Frank asserted that no legal research or case law was saved. 2 R.R. 93 (Motion for New Trial). Banks' counsel asked Frank whether Frank had researched "any Court of Criminal Appeals case law to understand any issues" in Banks case. *Id*. Frank replied, "Court of Appeals? I didn't specifically do that, no." *Id*.

Banks believed that "there was a probability of serious bodily injury or death that was imminent" because of Frank. 2 R.R. 28 (Motion for New Trial). Frank told Banks, "We can win this[.]" *Id*. at 44. Banks considered the fact that Banks had "been locked up for eight months." *Id*.

The first plea bargain offer by the State was "maybe 40, 50 years or something like that," according to Frank. 3 R.R. 91 (Motion for New Trial). The State extended a 15-year plea bargain offer on the day of trial. *Id*. at 91; *see* 2 R.R. 4-8 (Trial on the Merits and Punishment). Frank contradicted Banks' testimony, claiming that Frank recommended that Banks "take the deal" and denying that Frank advised Banks to go to trial. 3 R.R. 91 (Motion for New Trial) at 91-92.

### *c. Frank used inappropriate language to describe female witnesses and while speaking with female witnesses.*

Frank conceded that Frank's inappropriate behavior towards witnesses was unprofessional. *Infra*. For example, Frank agreed that Frank's reference to a witness as "fine as hell" was unprofessional. 3 R.R. 84 (Motion for New Trial). Frank agreed that it was also unprofessional when Frank told a witness, "I need you, baby." *Id*. at 11. Frank also agreed that it was unprofessional to address a witness as "hey, beautiful." *Id*. at 22. The record is laden with evidence that Frank sexualized female witnesses in Banks' case. *Supra*.

### *d. Frank facilitated an ill-advised early police encounter when Frank knew very little about the underlying facts of the case.*

When Frank began his representation of Banks, Frank took Banks to a police station and had Banks give a statement to police officers. 2 R.R. 58 (Motion for New Trial). At that point, Frank had not retained a private investigator, but Frank had evidence relating to the case. *Id*. at 58-59. Frank explained that Frank had three written statements, but that he did not have a video, a police report, or 911 calls. *Id*. at 59. Frank had a couple of photographs that did not depict the scene. *Id*. at 60.

According to Frank, Banks told police that Banks was acting in self-defense. 2 R.R. 60 (Motion for New Trial). Frank testified that self-defense was not Banks' "main argument" at that point. *Id*. Frank testified that Banks' "argument" was that "[Banks] was in fear for" Blackmore and that Blackmore had been attacked. *Id*. at 61. Banks was charged with murder "a couple of weeks later." *Id*. at 63.

#### *e. Frank disobeyed the defense subpoena issued in connection with the motion for new trial and was obstreperous in the production of evidence.*

Testimony revealed that Banks and Frank signed a written contract and, although Frank was under subpoena to produce it, Frank failed to produce the written contract at the oral hearing on Banks' motion for new trial. 2 R.R. 64-66 (Motion for New Trial). While walking through the defense subpoena with Banks' counsel, Frank admitted that Frank took notes. *Id*. at 67. When asked why Frank did not produce the notes, Frank stated that "I just received this not too long ago" but remarked that Frank was under the impression that Frank was "supposed to bring [Frank's] stuff" that day. *Id*.

Frank was asked, "Do you have any voir dire preparation that you're willing or able to hand over to us?" 2 R.R. 68 (Motion for New

Trial). Frank responded, "I should have that, yes." *Id*. Frank was later asked "... just to be clear, you have no preparation that you brought for us today for voir dire?" *Id*. at 69. Frank responded, "It's easily accessible. I believe that I can get that to you today[.]" *Id*.

Frank later stated, "I put everything on a flash drive." 2 R.R. 69 (Motion for New Trial). Frank was asked, "So you have a flash drive with you today that you brought that has all this stuff on it?" *Id*. at 70. Frank responded in relevant part, "Some of these things, I do not have; but [...]" *Id*. Frank's non-compliance with the defense subpoena was a reoccurring issue throughout the oral hearing on Banks' motion for new trial. *Infra*.

Banks' counsel complained to the Court that they did not have notes, voir dire preparation, opening statement preparation, preparation for any cross or direct examination, and motions. 2 R.R. 72 (Motion for New Trial). Frank admitted that those items existed. *Id*. The trial court recessed so that Frank could retrieve them. *Id*. at 73.

Frank admitted that Frank received eight requests for Banks' file. 2 R.R. 74-75 (Motion for New Trial). Frank admitted that the file Frank produced was missing text messages. *Id*. at 77. Frank admitted that Frank did not send Banks' counsel video files that Frank was in

possession of. *Id*. Frank's testimony suggested that a written contract between Banks and Frank existed, but that Frank failed to produce it. 2 R.R. 64-65 (Motion for New Trial).

Even after the Court recessed so that Frank could retrieve missing items, Frank admitted that "a motion or two" was not in Frank's file. 2 R.R. 87 (Motion for New Trial). Frank later stated that "[a] couple things" are not in the file, later describing them as "[i]nsignificant things." *Id*. at 88. Frank also admitted that emails between Frank and the prosecutor had not been produced. *Id*. at 87.

**(Ruling on Banks' Motion for New Trial and Subsequent Events)**

The trial court granted Banks' motion for new trial on June 17, 2024, by oral pronouncement. 3 R.R. 195-96 (Motion for New Trial). After the trial court's oral pronouncement, the State made a filing entitled "State's Objection to Motion for New Trial[.]" C.R. 322-25. The clerk's file stamp indicates that same was filed on June 17, 2024, at **10:31 PM**, well after the trial court's oral pronouncement granting Banks' motion for new trial. *Id*. at 322. [11]

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[11] Adding context and clarity, on June 18, 2024, the presiding judge stated that he left "a little early yesterday for some family business." 4 R.R. 4 (Motion for New Trial).

For reasons that are not entirely clear, the record reflects an exchange that occurred the day following the court's oral pronouncement. *See generally* 4 R.R. 1 (Motion for New Trial). The State referred to its "State's Objection to Motion for New Trial" for the first time on June 18, 2024, after the trial court's oral pronouncement granting Banks' motion for new trial. *Id*. at 5. At that juncture, counsel for the State argued, rather ambiguously, that "some of the evidence that I believe was admitted and considered that was not – I believe not permissible." *See id*.

Counsel for the State also argued, again after the trial court's oral pronouncement granting Banks' motion for new trial, that, "I don't believe that there was enough evidence to satisfy the second prong of Strickland, that a reasonable probability exists that but for Counsel's errors, the result would've been different." 4 R.R. 5 (Motion for New Trial). The State, however, did not obtain a ruling on its untimely objections or object to alleged refusal by the trial court to rule on its untimely objections. *See generally id*. The trial court's words did not indicate a ruling on the State's untimely objections. *See id*. at 9 ("I'm sure someone will make that decision for me").

The trial court's oral pronouncement granting Banks' motion for new trial was memorialized in a written order signed on June 25, 2024. C.R. 334. This appeal followed. C.R. 338-40.

## VIII. Summary of the Argument

The trial court acted within its discretion when it granted Banks' motion for new trial. Banks demonstrated that Frank's errors and omissions prejudiced Banks during both the guilt-innocence phase and the punishment phase of Banks' trial, satisfying the requirements of Strickland. The State's argument runs afoul of the "almost total deference" to the trial court that Kober v. State, 988 S.W.2d 230 (Tex. Crim. App. 1999), requires in these circumstances. *Infra* at 43-44.

The State's argument runs afoul of the "almost total deference" to the trial court that Kober v. State, 988 S.W.2d 230 (Tex. Crim. App. 1999), requires in these circumstances (i.e. the factfinder would have had a reasonable doubt respecting guilt). *Infra* at 44-52. There is a reasonable probability that, but for Frank's unprofessional errors and omissions, the result of the guilt-innocence phase of Bank's trial would have been different (i.e. the jury's assessment of punishment would have been less severe in the absence of Frank's deficient performance). *Infra* at 52-56.

Frank had a motive to derail Banks' case: covering up Frank's misdeeds. *Infra* at 56-59. The State wholly failed to make timely and proper objections based on Banks' pleadings or any alleged amendments

thereto, resulting in waiver of any colorable objections. Zalman is obviously distinguishable from the case at bar because the prosecutor in Zalman made timely and proper objections, unlike the prosecutor in the case at bar. *Infra* at 58-62. The State's brief does not challenge Frank's deficient performance. The trial court's unchallenged implied finding that Frank's performance was deficient should not be disturbed. *Infra* at 62.

The State's "Sole Point of Error" is multifarious because it argues pleading deficiencies, prejudice under Strickland, and nine distinct errors and omissions by Frank, and alleged misstatements of law in a single point of error. *Infra* at 63-64. For these reasons, and for other reasons shown herein and that may be shown during these proceedings, the Court should affirm the trial court's order granting Banks' motion for new trial in all things and grant Banks' requested relief.

## IX. Argument

The trial court acted within its discretion when it granted Banks' motion for new trial. Frank's performance was deficient during both the guilt-innocence phase and the punishment phase of Banks' trial. Banks showed that Frank's errors and omissions prejudiced Banks during both the guilt-innocence phase and the punishment phase of Banks' trial, satisfying the requirements of Strickland. The trial court's order granting Banks' motion for new trial should be affirmed in all things and Banks' requested relief should be granted.

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." Strickland v. Washington, 466 U.S. 668, 684 (1984). "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause[.]" *Id*. at 684-85. The Supreme Court of the United States has defined a fair trial as, "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Id*. at 685.

Subject to some exceptions not applicable in the present case, "a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained." *See* Strickland, 466 U.S. at 685. Mere presence and status as a lawyer are not enough to satisfy the Constitution. *See id*. "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Id*. The right to counsel is necessarily the right to the effective assistance of counsel. *See id*. at 686.

There are two categories of interference. *Infra*. The Government can interfere with an accused's rights to effective assistance of counsel. *See* Strickland, 466 U.S. at 686. "Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance." *Id*. at 686 (internal quotation marks omitted). The latter class of cases present claims of "actual ineffectiveness." *See id*. [12] "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the

[12] Banks follows the tradition of Texas cases, referring to "actual ineffectiveness" the naked term "ineffective assistance of counsel" interchangeably.

adversarial process that the trial cannot be relied on as having produced a just result." *Id*.

The test for an actual ineffective assistance of counsel claim has two prongs. *See* Strickland, 466 U.S. at 687. "First, the defendant must show that counsel's performance was deficient." *Id*. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. When both prongs are satisfied, the conviction or death sentence "resulted from a breakdown in the adversary process that renders the result unreliable." *See id*. [13] However, prejudice is legally presumed when there is "[a]ctual or constructive denial of the right to counsel altogether[.]" *See id*. at 692.

The deficient performance prong of Strickland, 466 U.S. at 687, requires the defendant to show that the defendant's counsel "made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Within this context, "the proper standard for attorney performance is that of reasonably effective assistance." *Id*. "When a convicted defendant complains of the

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[13] Note a major exception to the prejudice prong not at issue in this case: ineffective assistance of counsel claims based on conflict of interest. *See id*. at 693.

ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id*. at 687-88. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. at 688. [14]

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. Prejudice requires more than a showing that the conduct complained of "had some conceivable effect on the outcome of the proceeding." *See id*. at 693. However, defendants are not required to show that the challenged conduct "more likely than not altered the outcome of the case." *See id*. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id*. at 694. [15]

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[14] The Supreme Court of the United States has opined that, "[m]ore specific guidelines are not appropriate." *See id*. The Sixth Amendment "relies … on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *See id*.

[15] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See id*.

Beyond the basic duties that a defense attorney owes to their client, there is an "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *See* Strickland, 466 U.S. at 688. "Counsel's function is to assist the defendant[.]" *Id*. This encompasses a duty to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *See id*.

The foregoing duties are neither exhaustive nor form a checklist for judicial evaluation of attorney performance. *See* Strickland, 466 U.S. at 688. "Prevailing norms of practice as reflected in American Bar Association standards and the like … are guides to determining what is reasonable, but they are only guides." *Id*. The state of the law is such that, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *See id*. at 688-89.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[,]" and it is the defendant's burden to overcome this presumption. *See id*. A court must judge an actual ineffectiveness claim, "on the facts of the particular case" and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *See id*. at 690.

The question of prejudice, as it relates to the guilt-innocence phase of trial, is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695. Determinations of prejudice require the reviewing court to "consider the totality of the evidence before the judge or jury." *Id*.

Reviewing courts apply the same two-prong Strickland standard of review for ineffective assistance of counsel claims in both the guilt-

innocence phase of trial and the punishment phase of trial. *See* Milburn v. State, 15 S.W.3d 267, 269 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Our case law recognizes that, regardless of the potential punishment, the sentencing stage of any case is "the time at which for many defendants the most important services of the entire proceeding can be performed." *See* Milburn, 15 S.W.3d at 269. Within the context of a jury-assessed punishment, the prejudice prong of Strickland is framed as "whether there is a reasonable probability that the jury's assessment of punishment … would have been less severe in the absence of counsel's deficient performance." *See id*. at 270.

**(Standard of Review)**

"The standard of review when a trial court grants a motion for a new trial is abuse of discretion." State v. Thomas, 428 S.W.3d 99, 103 (Tex. Crim. App. 2014). The test is "whether the trial court acted without reference to any guiding rules or principles." *See id*. "The mere fact that a trial court may decide a matter differently from an appellate court does not demonstrate an abuse of discretion." *Id*. at 103-04. "Appellate courts view the evidence in the light most favorable to the trial court's ruling, defer to the court's credibility determinations, and presume that all

reasonable fact findings in support of the ruling have been made." *Id*. at 104.

"Ineffectiveness is not a question of basic, primary, or historical fact." *See* Strickland, 466 U.S. at 698 (internal quotation marks omitted). "Rather … it is a mixed question of law and fact." *See id*. at 698; *accord* Kober v. State, 988 S.W.2d 230, 233 (Tex. Crim. App. 1999). The question of prejudice "often contain subsidiary questions of historical fact, some of which may turn upon the credibility and demeanor of witnesses." *See id*. [16] Our Court of Criminal Appeal stated unequivocally that, "[a]ppellate courts must afford ***almost total deference to a trial court's determination of historical facts and of mixed questions of law and fact that turn on an evaluation of credibility and demeanor***." Kober, 988 S.W.2d at 233. (internal quotation marks omitted) (emphasis added). [17]

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[16] A *de novo* review is appropriate when a mixed question of law and does not turn on an evaluation of credibility and demeanor. *See* Guzman v. State, 955 S.W.2d 85, 89 (1997).

[17] The trial court is, for example, "in a position to evaluate the credibility of the prosecutor and defense trial concerning their testimony during [a] motion for new trial hearing." *See id*.

Sympathy, inarticulate hunch, personal belief that the defendant is innocent, and personal belief that the defendant received a "raw deal" are insufficient reasons to grant a motion for new trial. *See* Thomas, 428 S.W.3d at 104. The decision to grant a new trial must be supported by a legal or a legally valid reason. *See id*. Rule 21.3 of the Texas Rules of Appellate Procedure enumerates eight grounds where the defendant must be granted a new trial, or a new trial on punishment. However, the eight grounds enumerated in Rule 21.3 are not exclusive. *See id*.

Trial courts have the authority to grant a motion for new trial "in the interest of justice." *See* Thomas, 428 S.W.3d at 104-05. Within this context, "justice" means "in accordance with the law." *See id*. at 105. Generally, a trial court does not abuse its discretion in granting a motion for new trial when the defendant: (1) articulates "a valid legal claim in his motion for new trial[;]" (2) produces or points "to evidence in the trial record that substantiated [the defendant's] legal claim[;]" and (3) shows prejudice to his [or her] substantial rights under the standards in Rule 44.2 of the Texas Rules of Appellate Procedure. *See id*. [18]

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[18] Banks highlights that "prejudice" and "preservation" have different meanings. *See generally* State v. Herndon, 215 S.W.3d 901 (Tex. Crim. App. 2007) (discussing preservation within the context of motions for new trial).

**Issue 1. The trial court acted within its discretion when it granted Banks' motion for new trial. Banks demonstrated that Frank's errors and omissions prejudiced Banks during both the guilt-innocence phase and the punishment phase of Banks' trial, satisfying the requirements of Strickland.**

***a. The State's argument runs afoul of the "almost total deference" to the trial court that Kober v. State, 988 S.W.2d 230 (Tex. Crim. App. 1999), requires in these circumstances.***

The trial court's ruling is entitled to "almost total deference" because ineffectiveness is "a mixed question of law and fact." Kober, 988 S.W.2d at 233; Strickland, 466 U.S. at 698. As Strickland, 466 U.S. at 698, notes is often the case, this case turns on subsidiary questions of historical fact that turn upon the credibility and demeanor of witnesses. Since this case involves an "application of law to fact question," the Court should view the evidence in the light most favorable to the order granting Banks' motion for new trial. Guzman, 955 S.W.2d at 89 (1997). It is through this lens and only through this lens that appellate review can occur.

The trial could have found and obviously did find that: (a) Frank's testimony was incredible; and (b) that Frank's demeanor insincere and disrespectful. Frank was consistently nonresponsive in his testimony. *See e.g.* 3 R.R. 11-84 (Motion for New Trial). Frank repeatedly disobeyed

the subpoena that was directed to him. *Supra* at 27-29 (chronicling same in the appellate record). It was only after the trial court alluded to contempt that Frank made any meaningful attempt to comply. *See* 2 R.R. 88 (Motion for New Trial). These, however, are only examples of disruptive, obstreperous behavior that can be gleaned from a cold record: the trial court was watching Frank in real time while this occurred, and deference must be given to the trial court's findings irrespective of whether they are explicit or implied.

The trial court had every reason to disbelieve every word out of Frank's mouth – Frank behaved like a liar. The trial court was in a position where it could have applied Strickland completely disregarding Frank's testimony, and Kober requires this Court to give almost total deference to that difficult decision. Any quibbling over evidence of ineffectiveness should be viewed in the light most favorable to Banks under Guzman.

***b. There is a reasonable probability that, but for Frank's unprofessional errors and omissions, the result of the guilt-innocence phase of Bank's trial would have been different (i.e. the jury's assessment of punishment would have been less severe in the absence of Frank's deficient performance).***

Frank's errors and omissions prejudiced Banks during the guilt-innocence phase of trial. Frank, without consultation with or consent by Banks, decided to forego the testimony of Blackmore, the Complainant's girlfriend, and Tyana. Such testimony would have been favorable to Banks and would have tended to exculpate Banks. [19] Frank's decision to forego the testimony of Blackmore, the Complainant's girlfriend, and Tyana must be viewed in light of the nine deficiencies enumerated in Banks' motion for new trial, several of which overlap with and/or have direct bearing on Frank's decision to forego the testimony of Blackmore, the Complainant's girlfriend, and Tyana, and the additional grounds shown during the oral hearing which were not met by timely, proper objection. Frank's errors and omissions should not be analyzed granularly: Strickland, 466 U.S. 695, calls for a totality of the evidence analysis. Such an analysis leads to only one conclusion: there is a reasonable probability that, but for Frank's unprofessional errors and

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[19] "Favorable evidence includes exculpatory evidence as well as impeachment evidence. Exculpatory evidence is that which may justify, excuse, or clear the defendant from alleged guilt, and impeachment evidence is that which disputes, disparages, denies, or contradicts other evidence." Pena v. State, 353 S.W.3d 797, 811–12 (Tex. Crim. App. 2011)

omissions, the result of the guilt-innocence phase of Bank's trial would have been different. *See* Strickland, 466 U.S. at 691-94 (requiring same).

There are no special amplifications of counsel's duty to investigate. Strickland, 466 U.S. at 690. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id*. "Strategic choices made after less than complete investigation are reasonable [only] to the extent that reasonable professional judgments support the limitations on investigation." *Id*. at 690-91.

Cases draw a distinction between trial counsel's decision to forego presentation of evidence and the failure to investigate and evaluate such evidence. *See* Milburn, 15 S.W.3d at 270 (punishment evidence). Trial counsel's decision to forego presentation of evidence can only be made after evaluating available testimony and determining that it would not be helpful. *See id*. Trial counsel's admission that trial counsel neither

investigated nor evaluated available evidence can be consequential. *See id*.

Character evidence is admissible in certain circumstances. *See* TEX. R. EVID. 404. Subject to the rule of evidence governing evidence of previous sexual conduct in criminal cases, a defendant in a criminal case, "may offer evidence of a victim's pertinent trait[.]" *See id*. at 404(a)(3). "[A] defendant may offer evidence of the victim's character trait for violence to demonstrate that the victim was, in fact, the first aggressor." Ex parte Miller, 330 S.W.3d 610, 619 (Tex. Crim. App. 2009). Such evidence may be used by the defense during the guilt-innocence phase of trial. *See e.g. id*. at 614.

The thrust of the State's argument is that Banks "failed to prove he was harmed by the alleged instances of ineffective assistance." State's Br. 13. The State's argument – a "failure to prove harm" – is a less than adequate approximation of Strickland that invites a less than adequate result. Strickland, 466 U.S. at 693, is plain insofar as Banks is ***not*** required to show that the challenged conduct "more likely than not altered the outcome of the case." Banks is instead required to show "that there is a ***reasonable probability*** that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *See id*. at 694 (emphasis added).

Frank did not meet his duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *See* Strickland, 466 U.S. at 690-91 (discussing counsel's duty to investigate). Frank did not make strategic choices: Frank was "shooting in the dark," and in some instances, deliberately making decisions contrary to Banks' interests, and professional judgment did not support Frank's conduct. Frank did not just forego the presentation of evidence: Frank did not investigate and evaluate it. *See* Milburn, 15 S.W.3d at 270 (discussing the distinction between choosing to forego the presentation of evidence and failing investigate and evaluate evidence).

Frank did not speak to each author of the written statements available to him. 2 R.R. 95. Instead, Frank alleged that Frank spoke to "sort of … a facilitator for the other two." *Id*. There were no attorney notes that corroborated Franks assertion. *See id*. Frank's defiance of the motion for new trial subpoena and the suspect claim that Frank, an attorney representing a defendant in a murder case, chose not to keep notes were good reasons, among others, to disbelieve Frank.

Even if Frank was honest in his testimony, Frank fell into the same trap described in Milburn, 15 S.W.3d at 270. Since Frank did not interview the witnesses, Frank could not intelligently evaluate available testimony to determine whether it would be useful. This evaluation obviously includes the content of testimony which is unlikely to be telegraphed through a lay "facilitator." The evaluation also includes an assessment of the credibility and demeanor of a possible witness, something that certainly cannot be conveyed through a lay "facilitator."

Frank did not subpoena the Complainant's girlfriend even though there was evidence of domestic violence between the Complainant and the Complainant's girlfriend. 2 R.R. 85-86 (Motion for New Trial). Frank did not subpoena Tyana even though he knew there was "domestic violence going on" between the Complainant and Tyana. 3 R.R. 24-25 (Motion for New Trial). The testimony of the Complainant's girlfriend and Tyana's testimony would have been admissible under Rule 404 of the Texas Rules of Evidence and Miller to demonstrate that the Complainant was the first aggressor.

There were three sources of testimony that could have corroborated Banks' position that the Complainant was the first aggressor: Blackmore,

who the Complainant savagely beat until she had two black eyes and a broken nose, as well as the Complainant's girlfriend and Tyana, victims of the Complainant's domestic violence. [20] These witnesses were critical because there were punches thrown that weren't on video," and even the trial court acknowledged that some of what occurred was not on video. 2 R.R. 38, 41 (Motion for New Trial). Frank's decision not to subpoena Blackmore, the Complainant's girlfriend, and Tyana was not just some judgement call that did not pan out: it was a deliberate and reckless decision that eviscerated any hope that Banks had of walking out of the courtroom.

The decision to forego Blackmore, the testimony of the Complainant's girlfriend, and Tyana's testimony is only a leaf in the forest. When Frank decided not to issue a single subpoena, Frank decided to forego ***every other eyewitness*** who had firsthand knowledge that could have corroborated Banks' testimony. 2 R.R. 109 (Motion for New Trial) (Frank admitting that he did not subpoena witnesses for trial).

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[20] *See* 7 R.R. 76 (Trial on the Merits and Punishment) (Bank's trial testimony); *see also* 2 R.R. 52 (Motion for New Trial) (Blackmore's testimony about her injuries during the motion for new trial); *see also* 3 R.R. 24-25 (Motion for New Trial) (Frank's admission that Tyana said there was "domestic violence going on" between the Complainant and Tyana).

Banks, a black man accused of murder who learned of his trial date as he walked into trial, a man who was completely unprepared to testify and whose defense rested on eyewitnesses testifying about what was not captured on video, had to fend for himself.

The issue is not limited to Frank rending no assistance. Frank's failure put Banks in a worse position than Banks started from. Frank, who was too busy sexualizing witnesses than subpoenaing them, ultimately put Banks in a position where Banks was infinitely worse off than if Banks had just defended himself *pro se*. At least Banks had the common sense to try to marshal witnesses from jail – at least Banks knew that they needed to be at trial. 2 R.R. 34-35 (Motion for New Trial). The only thing Banks is guilty of is trusting that Frank would respect and carry out Frank's oath of office. [21]

There is a reasonable probability that the omitted evidence (testimony about the Complainant's aggression, what happened off camera, and the severity of Blackmore's injuries) would have resulted in a different outcome during the guilt-innocence stage of Banks' trial.

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[21] Texas attorneys are sworn to discharge their duties to clients to the best of their abilities. TEX. GOV'T CODE § 82.037(a)(3).

Accordingly, there is a reasonable probability that, but for Frank's unprofessional errors and omissions, the result of the guilt-innocence phase of Bank's trial would have been different (i.e. the factfinder would have had a reasonable doubt respecting guilt).

***c. There is a reasonable probability that, but for Frank's unprofessional errors and omissions, the result of the punishment phase of Bank's trial would have been different (i.e. the jury's assessment of punishment would have been less severe in the absence of Frank's deficient performance).***

Frank's errors and omissions prejudiced Banks during the punishment phase of trial. Frank erroneously advised Banks against plea bargain offers less than the 63 years assessed by the jury. Frank failed to put on a meaningful case during punishment and failed to subpoena Blackmore, the Complainant's girlfriend, and Tyana, all of whom could have could have provided mitigating testimony. For the same reasons stated above, Frank's decision to forego the testimony of Blackmore, the Complainant's girlfriend, and Tyana must be viewed in light of the nine deficiencies enumerated in Banks' motion for new trial, several of which overlap with and/or have direct bearing on Frank's decision to forego the testimony of Blackmore, the Complainant's girlfriend, and Tyana, and

the additional grounds shown during the oral hearing which were not met by timely, proper objection. Such an analysis leads to only one conclusion: there is a reasonable probability that, but for Frank's unprofessional errors and omissions, the result of the punishment phase of Bank's trial would have been different. *See* Strickland, 466 U.S. at 691-94 (requiring same).

The failure to provide "counterweight to evidence of bad character … received by the jury" during the punishment phase of trial can be a basis for ineffective assistance of counsel. *See e.g.* Milburn, 15 S.W.3d at 271. Prejudice may be demonstrated "even though it is sheer speculation that character witnesses in mitigation would have in fact favorably influenced the jury's assessment of punishment." *See id*. The Fourteenth District has found prejudice where counsel's lack of effort at the punishment phase of trial was shown, the mitigating evidence clearly would have been admissible, and "[t]he jury would have considered it and possibly been influenced by it." *See id*.

The trial court, who witnessed Frank's defiance, resistance, and inconsistencies, was free to believe Banks' account that Frank told Banks that they could "win this." The trial court was also free to believe Banks'

account that Banks' rejection of the State's offer was on Frank's advice. *See* 2 R.R. 13-14, 44 (Motion for New Trial). Banks would have accepted the State's offer had Banks "been advised that the evidence is clear" that Banks "did not have the right to use lethal force in defense of a third person or" himself "in this situation[.]" *Id*. at 14. The State's offers (initially "maybe 40, 50 years or something like that" and later 15 years) are undeniably less severe that the 63 years assessed by the Jury. *See* 3 R.R. 91 (Motion for New Trial); *see id*. at 91; *see* 2 R.R. 4-8 (Trial on the Merits and Punishment). Since Frank erroneously advised Banks against plea bargain offers less than the 63 years assessed by the jury, and Banks testified that Banks would have accepted the State's offer had Banks "been advised that the evidence is clear" that Banks "did not have the right to use lethal force in defense of a third person or" himself "in this situation," Frank's conduct prejudiced Banks during the punishment phase of trial.

Evidence that the Complainant was the first aggressor, that the Complainant savagely beat Blackmore off camera, and that Blackmore was beaten so severely that Blackmore had two black eyes, and a broken nose would have mitigated Banks' punishment. Instead, the jury was led

to believe falsely in the State's closing argument that the Complainant was not a vicious woman beater, and the jury did not hear important details about Blackmore's injuries. But for the cascade of errors and omissions by Frank, there is a reasonable probability that Banks would have received a less severe sentence.

This miscarriage of justice cannot be divorced from the attendant circumstances. The attendant circumstances show that Frank put no meaningful effort into defending Banks, and in fact harmed Frank's case. Frank's failure to subpoena Blackmore's medical records, failure to conduct a vigorous voir dire, failure to hold frequent meetings – or even a single meeting – with Banks while Banks was in jail, failure to prepare Banks to testify, failure to hire a mitigation expert, failure to hire an investigator, failure to pay attention to deadlines such as the deadline to make a punishment election, and failure to interview witnesses had a cumulative and disastrous effect on Banks' defense. The totality of the evidence demonstrates that Frank did not just make a mistake: Frank sabotaged Banks.

For these reasons, there is a reasonable probability that, in the absence of Frank's errors and omissions, the jury's assessment of

punishment in Banks' trial would have been less severe. *See* Milburn, 15 S.W.3d at 270. Stated differently, there is a reasonable probability that, but for Frank's unprofessional errors and omissions, the result of the punishment phase of Banks' trial would have been different. *See* Strickland, 466 U.S. at 691-94 (requiring same).

***d. Frank had a motive to derail Banks' case: covering up Frank's misdeeds.***

Banks' trial was not one in which evidence was subjected to adversarial testing. *See* Strickland, 466 U.S. at 685 (requiring same). Frank was certainly present and had the status of a lawyer, but Frank did not play the role that was necessary to ensure that the trial was fair. *See id*. at 685 (discussing same). Stated more bluntly, Frank's errors and omissions so undermined the proper functioning of the adversarial process in Banks' trial that the trial cannot be relied on as having produced a just result. *See id*. at 686.

Frank failed to meet "the overarching duty to advocate" for Banks. *See* Strickland, 466 U.S. at 688 (discussing defense counsel's overarching duty to advocate). The decisions that Frank made had the practical effect of tilting the scales of justice to the other side: Frank's decisions had the practical effect of furthering the prosecution. Frank's decisions were, in

plainer terms, more than a series of grave blunders – they were a near-guaranteed pathway, if not a guaranteed pathway, to wrongful conviction and a severe punishment that could have, in the very least, been mitigated.

We are all left with the burning question of how Frank could miss the mark by such a distance. When Frank was not frequenting nightclubs, Frank was sexualizing witnesses. *Supra* at 12, 26 (chronicling same in the appellate record). Frank had received funds in trust, but kept no real records of any work and did not follow through with decisions to hire experts. *Supra* at 19-21 (chronicling same in the appellate record). The easiest thing for Frank to do was to just silently give up and "let it happen." That approach would probably save Frank's hide. Fortunately, it did not work – a man's life was a hair's width from destruction and Frank was called to account, at least in some form and fashion, by the trial court. Reversing the trial court's order granting Banks' motion for new trial is nothing short of condoning Frank and it would only send a message to the public that the vicious remarks and jokes lawyer we so often hear are warranted.

Frank's motive to cover up his misdeeds is obvious, should be considered under the totality of the evidence calculus in Strickland, and weighs heavily in favor of holding that Frank's conduct prejudiced Banks during both the guilt-innocence phase and the punishment phase of Banks' trial.

***e. The State wholly failed to make timely and proper objections based on Banks' pleadings or any alleged amendments thereto, resulting in waiver of any colorable objections. Zalman is obviously distinguishable from the case at bar because the prosecutor in Zalman made timely and proper objections, unlike the prosecutor in the case at bar.***

The State wholly failed to make timely and proper objections based on Banks' pleadings or any alleged amendments thereto, resulting in waiver of any colorable objections. Zalman is obviously distinguishable from the case at bar because the prosecutor in Zalman made timely and proper objections, unlike the prosecutor in the case at bar. The State essentially asks this Court for a "free pass" and to hold it to a different standard when criminal defendants are expected to religiously preserve error. In any event, Banks pleaded and proved a valid ineffective assistance of counsel claim.

When it comes to the issue of procedural default, the Court of Criminal Appeals does not engage in "hair splitting." *See* Clarke v. State, 270 S.W.3d 573, 580 (Tex. Crim. App. 2008). Its holdings have been plain in this regard:

> … all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.

*Id*. Stated differently, "[s]traightforward communication in plain English will always suffice[.]" *Id*.

Within the context of direct appeals, the "common rationale is that a particular argument relied upon on appeal must have been presented to the trial court." *See* Clarke, 270 S.W.3d at 582. For example, it is not the case that "a specific constitutional provision that is cited on appeal must also have been cited to the trial judge." *See id*. Adding "more whistles and bells on appeal" when "the tune [is] the same" and "the same basic argument" is presented to the trial court and appellate courts does not result in waiver. *See id*. at 581.

The State is not entitled to unequal standing on appeal: the State is susceptible to waiver, like any other litigant. *See infra*. Our case law

explicitly permits a trial court to consider the merits of an untimely amendment to a motion for new trial if the State does not object. *See* Clarke, 270 S.W.3d at 581. This rule has been extended to situations where the defendant does not file a written amendment to his or her original motion but brings the aspect or enlargement of the original claim to the attention of both the prosecutor and the trial judge, and the prosecutor does not object. *See id*. The decision to not object when an oral hearing on a motion for new trial "goes off the beaten path" is consequential for the State as it is for any other litigant. *See supra*.

The State relies on State v. Zalman, 400 S.W.3d 590 (Tex. Crim. App. 2013), for the proposition that there was an untimely amendment in the case at bar. *See generally* State's Br. 10. Zalman is obviously distinguishable from Banks' case because the prosecutor in Zalman, 400 S.W.3d 591, "strenuously objected … on the grounds that it was an untimely amendment to the appellee's motion for new trial[.]" The objections occurred before the trial court's ruling on the motion for new trial. *See id*. at 591 ("[t]he judge overruled the State's objections and allowed the hearing to proceed"). The facts in Zalman are wildly different from the facts in Banks' case.

The State's brief glosses over the Zalman's nuanced language. The opinion repeatedly references a "proper objection" by the State as a predicate. *See* Zalman, 400 S.W.3d 591, 593, 595 ("[w]e have interpreted this statute as barring amendments outside of the thirty-day time limit, even with leave of the court, ***so long as the State properly objects***") (emphasis added).

The prosecutor in this case chose to wait until nearly mid-night ***after*** the trial court made an oral pronouncement granting Bank's motion before raising objections that the State now attempts to exploit on appeal. [22] If that were not enough, the prosecutor did not secure or even attempt to secure the trial court's ruling on the State's untimely objections. *See generally* 4 R.R. 5 (Motion for New Trial). The proper response when a trial court fails or refuses to make a ruling is to object to the failure or refusal. There is perhaps no better demonstration of when the State can and did waive arguments than the case at bar.

Allowing the State to advance its arguments on appeal would put the State and criminal defendants on unequal footing. It would mean, in

[22] *See* 3 R.R. 195-96 (Motion for New Trial) (oral pronouncement on June 17, 2024); *see also* C.R. 322 (clerk's 10:31 P.M. file stamp on "State's Objection to Motion for New Trial"); *see also generally* 4 R.R. 5 (Motion for New Trial) (colloquy of late objections on June 18, 2024 where no ruling was obtained).

layman's terms that it is acceptable for the State to "lose," consult their appellate department, file post-hoc, eleventh-hour objections after "losing," and be given a second bite at the apple. There is no universe where this Court would ever permit a criminal defendant to do the same thing. The State's argument on appeal offends basic concepts of adversarial litigation.

For these reasons and others that may be shown during these proceedings, the Court should hold that State waived any objections it may have had to Banks' pleading or any alleged amendments thereto. The Court should grant Banks' requested relief.

***f. The State's brief does not challenge Frank's deficient performance. The trial court's unchallenged implied finding that Frank's performance was deficient should not be disturbed.***

The State's brief references the first prong of Strickland (deficient performance). *See* State's Br. 11. However, the State's brief does not challenge that Frank's performance was deficient. *See generally id*. Instead, the State raised what it labeled as its "Sole Point of Error" challenging the second prong of Strickland (prejudice), among other things. *See id*. at 8. Since the State's brief does not challenge that Frank's

performance was deficient, the trial court's implied finding that Frank's performance was deficient should not be disturbed.

***g. The State's "Sole Point of Error" is multifarious because it argues pleading deficiencies, prejudice under Strickland, and nine distinct errors and omissions by Frank, and alleged misstatements of law in a single point of error.***

The State's "Sole Point of Error" is multifarious because it argues pleading deficiencies, prejudice under Strickland, and nine distinct errors and omissions by Frank, and alleged misstatements of law in a single point of error. *See generally* State's Br. 9, 23,11-23, 24-27. A point of error is multifarious when it raises more than one specific complaint, and it risks rejection on that basis alone. *See* Mays v. State, 318 S.W.3d 368, 385 (Tex. Crim. App. 2010). The State's "Sole Point of Error" should be overruled because it is not meritorious, it is multifarious, and for other reasons shown herein and that may be shown during these proceedings.

**(Conclusion)**

The trial court acted within its discretion when it granted Banks' motion for new trial. Frank's performance was deficient during both the guilt-innocence phase and the punishment phase of Banks' trial. Banks showed that Frank's errors and omissions prejudiced Banks during both the guilt-innocence phase and the punishment phase of Banks' trial,

satisfying the requirements of Strickland. Frank rendered ineffective assistance of counsel to Banks during both the guilt-innocence phase and the punishment phase of Banks' trial. Banks was denied Banks' fundamental right to a fair trial. The Court should affirm the trial court's order granting Banks' motion for new trial in all things and grant Bank's requested relief.

## X. Prayer

Wherefore, premises considered, Banks prays that the Court deny the State's requested relief and affirm that order from which an appeal was taken granting Banks a new trial. Banks prays for such further and additional relief which Banks is justly entitled to at law and in equity.

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Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, the undersigned certifies that this filing contains 12,292 words, excluding those portions permitted under Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure. The undersigned relied on the word count of the computer program used to prepare this filing, Microsoft Word.

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Pursuant to Rule 9.5 of the Texas Rules of Appellate Procedure, the undersigned certifies that, on March 31, 2025, a true and correct copy of the foregoing was served on all parties to this proceeding. The name, address, and manner of service for each party served is as follows:

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