

NO. 14-24-00307-CR

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IN THE FOURTEENTH COURT OF APPEALS
DEBORAH M. YOUNG
HOUSTON, TEXAS
Clerk of The Court

DEMONTRE JALEEL PITTS-MARSHALL
Appellant

v.

STATE OF TEXAS
Appellee

On Appeal from Cause # 1789509 from the 488th District Court of
Harris County, Texas

APPELLANT'S BRIEF

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Oral Argument Requested

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Statement of the Case

Appellant Demontre Pitts-Marshall was indicted for the felony offense of aggravated assault of a public servant with an enhancement paragraph for a prior conviction for evading arrest in a motor vehicle. (CR 21.) After a brief trial, a jury found him guilty. (CR 195, 5 RR 20.)

At sentencing, Appellant pled true to the enhancement paragraph and the trial court sentenced him to twenty-five years in prison. (CR 197, 6 RR 6-7, 8 RR 4.)

The trial court certified Appellant's right of appeal and Appellant timely filed a notice of appeal. (CR 202, 208.)

Statement Regarding Oral Argument

The issue presented in this case has caused a circuit split.

Two courts of appeals (including this Court in an unpublished opinion) have decided the issue in the State's favor. *Rice v. State*, 195 S.W.3d 876, 881–82 (Tex. App.—Dallas 2006, pet. ref'd); *Calhoun v. State*, No. 14-09-00936-CR, slip op. at 7–8 (Tex. App.—Houston [14th Dist.] Feb. 8, 2011, no pet.) (mem. op., not designated for publication). One court of appeals has decided it in the defendant's favor. *Dean v. State*, 449 S.W.3d 267, 269 (Tex. App.—Tyler 2014, no pet.).

Whatever this Court decides, there is a good chance that the Court of Criminal Appeals will grant PDR in this case to resolve the split.

Oral argument would allow the Court to have all of its questions answered before writing an opinion that will contribute to this split and probably be scrutinized by the Court of Criminal Appeals.

Issues Presented

Appellant was charged with aggravated assault on a public servant for assaulting a Department of Homeland Security special agent.

The Texas Penal Code defines *public servant* as an officer, employee, or agent of the “government” and defines *government* as “the state.”

1. Does “the state” in the Penal Code’s definition of *government* mean “the State of Texas” or “the State of Texas and the United States”?
2. If “the state” means only “the State of Texas,” was there sufficient evidence to support Appellant’s conviction for aggravated assault on a public servant when the evidence showed that he assaulted an agent of the United States government?

Statement of Facts

1. The indictment

Appellant was indicted for aggravated assault on a public servant for intentionally and knowingly threatening complainant “J. Dugger,” a public servant, with imminent bodily injury by using and exhibiting a deadly weapon, namely, a motor vehicle, while the complainant was lawfully discharging an official duty and knowing that the complainant was a public servant. (CR 21.) The indictment also contained an enhancement paragraph for Appellant’s prior felony conviction for evading arrest in a motor vehicle. (*Id.*)

Aggravated assault on a public servant is normally first-degree felony punishable by five years to life in prison. Tex. Penal Code §§ 12.32(a), 22.02(b)(2)(B). But the enhancement paragraph increased Appellant’s punishment range to fifteen years to life in prison. *Id.* § 12.42(c)(1).

2. The trial

The evidence at trial showed that Appellant drove his car into a fenced, keypad-secured parking lot next to a building where various law enforcement officers worked. (4 RR 18–20.) Appellant’s actions in the parking lot were captured by a surveillance camera that did not record audio. (State’s Exhibit # 24.)

After driving into the lot, Appellant parked his car between two vehicles, one of which was a truck. (4 RR 27-28.) A passenger exited Appellant's car, looked through driver's side window of the truck, and broke it. (4 RR 29.)

The truck belonged Homeland Security Investigations (HSI) Special Agent Hiram Prado, who had just parked his truck there after returning from the bank. (4 RR 28, 58-60.) Special Agent Prado worked with fellow HSI Special Agents Luis Serrano and Jose Dugger (the complainant) in the building next to the parking lot. (4 RR 18, 20, 58-60.)

Dugger and Serrano watched the break-in from Serrano's second-floor office. (4 RR 26-28, 60-61, 64.) Realizing that Prado's truck was about to be burglarized, Dugger and Serrano ran out of the office towards the parking lot. (4 RR 28, 64-65.) They were dressed in plain clothes. (4 RR 52, 78.)

After entering the keypad code to open the parking lot's gate, Dugger drew his gun and approached the truck from the rear. (4 RR 65, 67.) Serrano also drew his weapon and approached from the front. (4 RR 29.)

Dugger saw that the passenger was leaning into Prado's truck. (4 RR 65.) He yelled for the passenger to stop and identified himself as a police officer. (*Id.*) As the passenger got back into Appellant's car and tried to sit down in the front passenger seat, Dugger grabbed him by his shirt. (4 RR 66.)

Dugger again identified himself as a police officer and tried to pull the passenger back outside the car. (4 RR 67.) As he struggled with the passenger, Dugger noticed that the passenger was holding a window punch. (*Id.*)

As Dugger struggled with the passenger, Appellant put the car in reverse and started backing out of the parking spot. (4 RR 67–69.) The passenger door was still open. (4 RR 69.) Dugger backed away to avoid becoming trapped between the car's open door and the truck. (4 RR 69–70.)

As Appellant drove backwards, one of the car's tires ran over Dugger's foot as he began to turn, causing an injury to his knee. (4 RR 35, 71; State's Exhibit #29.)

Meanwhile, Serrano, who was standing in front of Appellant's car with his gun drawn, identified himself as a police officer and yelled for Appellant to stop. (4 RR 30–33.) When the car didn't stop, Serrano

fired two shots into it. (4 RR 33.) The shots did not hit anyone. (*Id.*) Appellant then stopped the car and got out with his hands up. (*Id.*)

Neither Appellant nor his passenger testified at trial.

Appellant's counsel argued that jury should acquit him because he was just trying to back out of the parking spot and did not intend to injure Dugger with his car. (5 RR 11, 13.) He also argued that Appellant didn't know that Dugger or Serrano were public servants because they were in plain clothes and lied about identifying themselves as police. (5 RR 11-12.)

The jury found Appellant guilty. (CR 195, 5 RR 20) Appellant pled true to the enhancement paragraph and the trial court sentenced him to twenty-five years in prison. (6 RR 6-7; 8 RR 4.)

Summary of the Argument

To be convicted of aggravated assault on a public servant, a defendant must have assaulted a public servant.

In relevant part, the Texas Penal Code defines *public servant* as “an officer, employee, or agent of government.” Tex. Penal Code § 1.07(a)(41)(A). The Penal Code further defines *government* as “the state; a county, municipality, or a political subdivision of the state; or

any branch or agency of the state, a county, municipality, or political subdivision.” *Id.* § 1.07(a)(24)(A)–(C).

In *Montgomery v. State*, 571 S.W.2d 18 (Tex. Crim. App. 1978), the Court of Criminal Appeals held that “the state” in the Penal Code’s definition of *government* means the State of Texas, not the federal government. *Id.* at 19–20.

Montgomery has never been overruled, and its interpretation of “the state” is the most natural reading of that term.

Because Special Agent Dugger was a federal agent, he was not a public servant under the Penal Code. Consequently, there is insufficient evidence to support Appellant’s conviction for aggravated assault on a public servant.

The remedy is to modify the judgment to reflect a conviction for the lesser-included offense of aggravated assault with a deadly weapon and remand Appellant’s case for a new punishment hearing.

Legal Standards

In reviewing the legal sufficiency of the evidence, an appellate court must consider all of the evidence in the light most favorable to the verdict to determine whether a rational jury could have found the

essential elements of the crime beyond a reasonable doubt. *Walker v. State*, 594 S.W.3d 330, 335 (Tex. Crim. App. 2020).

The essential elements of a crime are defined by the hypothetically correct jury charge. *Id.* at 336. The hypothetically correct jury charge, is one that “accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Id.*

The essential elements of aggravated assault on a public servant with a deadly weapon, as authorized by Appellant’s indictment, are: (1) Appellant, (2) intentionally or knowingly, (3) threatened Dugger with imminent bodily injury, (4) by using or exhibiting a deadly weapon, (5) knowing that Dugger was a public servant, (6) who was lawfully discharging an official duty. Tex. Penal Code §§ 22.01(a)(2), 22.02(a)(2), 22.02(b)(2)(B); *Brumbelow v. State*, 432 S.W.3d 348, 351 (Tex. App.—Waco 2014, no pet.).

In some cases, like this one, the sufficiency of the evidence doesn’t turn on the facts but on the meaning of the law that the defendant was charged with. See *Walker*, 594 S.W.3d at 336. In these cases, the appellate court determines whether the defendant’s conduct “actually

constitutes an offense under the relevant statute.” *Id.* Because this analysis concerns statutory interpretation, the appellate court conducts this review de novo. *Id.*

A defendant does not need to object at trial to preserve a challenge to the sufficiency of the evidence on appeal. *Moff v. State*, 131 S.W.3d 485, 488 (Tex. Crim. App. 2004).

Argument

- 1. The evidence was legally insufficient for the jury to convict Appellant of aggravated assault on a public servant because the Penal Code excludes federal law enforcement officers from its definition of *public servant***

As is relevant to this case, the Texas Penal Code defines *public servant* as “an officer, employee, or agent of government.” Tex. Penal Code § 1.07(a)(41)(A). It further defines *government* as “the state; a county, municipality, or political subdivision of the state; or any branch of agency of the state, a county, municipality, or political subdivision.” *Id.* § 1.07(a)(24)(A)–(C).

- A. The Court of Criminal Appeals has held that “the state” in the Penal Code’s definition of *government* means only “the State of Texas”**

Over forty years ago, in *Montgomery v. State*, 571 S.W.2d 18 (Tex. Crim. App. 1978), the Court of Criminal Appeals held that “the state”

in the Penal Code’s definition of *government* means only the State of Texas, not the United States. *Id.* at 19.

Montgomery concerned a defendant who was convicted of aggravated assault and sentenced to life in prison after the trial court found two enhancement paragraphs in the indictment to be true. *Id.* One of the enhancement paragraphs listed a federal felony conviction for “making a false and fictitious written statement to a licensed dealer in firearms, in connection with the acquisition of a firearm.” *Id.*

At the time, the Court of Criminal Appeals had held that a federal felony conviction could be used for enhancement purposes only if the same conduct could have been punished as a felony under Texas law. *Id.* Montgomery argued that there was no similar state felony offense; the State argued that the similar state felony offense was tampering with a governmental record. *Id.*

Tampering with a governmental record, then as now, made it a felony to make a false entry in a “governmental record.” *Id.*; Tex. Penal Code § 37.10(a)(1). The Penal Code defined *governmental record*, then as now, as “anything required by law to be kept by others for information of government.” *Montgomery*, 571 S.W.2d at 19; Tex. Penal Code § 37.01(2)(B). And the Penal Code defined *government*, then as now, as

“the state; a county, municipality or political subdivision of the state; or any branch of agency of the state, a county, municipality or political subdivision.” *Compare* Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1 (eff. Jan. 1, 1974) (previously codified at Tex. Penal Code § 1.07(a)(15))¹ *with* Tex. Penal Code § 1.07(a)(24)(A)-(C).²

The Court held that Penal Code’s definition of *government* “does not include the federal government, but only the state, counties, municipalities, or political subdivisions of the state.” *Montgomery*, 571 S.W.2d at 19. Thus, Montgomery could not have been prosecuted under Texas law for tampering with a federal government record. *Id.*

Because no Texas law made what Montgomery did a felony, the Court held that his federal felony conviction could not be used for enhancement and remanded the case for resentencing. *Id.*

¹ The Penal Code’s definition of *government*, as it existed from 1974 to 1994, can be viewed at https://lrl.texas.gov/LASDOCS/63R/SB34/SB34_63R.pdf#page=511.

² The definition was moved from § 1.07(a)(15) to § 1.07(a)(24)(A)-(C) in 1994. Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, (eff. Sept. 1, 1994), https://lrl.texas.gov/LASDOCS/73R/SB1067/SB1067_73R.pdf#page=3840. The definition was split into three subsections, but the text remained the same. *Id.*

i. ***Montgomery's enhancement holding has been overruled, but its interpretation of the Penal Code's definition of government has not***

Three years later, the Court of Criminal Appeals revisited *Montgomery* in the case of *Ex parte Blume*, 618 S.W.2d 373 (Tex. Crim. App. 1981).

Blume was convicted of felony possession of marijuana and had his sentence enhanced by a federal felony conviction for receiving and concealing a stolen motor vehicle. *Id.* 374, 376. He filed a writ of habeas corpus arguing that his federal conviction could not be used to enhance his sentence because there was no equivalent felony under Texas law. *Id.* at 374. The trial court agreed and granted relief. *Id.*

The Court of Criminal Appeals reversed, holding that Blume's federal felony conviction could be used for enhancement regardless of whether there was a similar felony under Texas law. *Id.* at 376.

The Court noted that federal felony convictions could be used for enhancement under the old Penal Code only if there was an equivalent felony under state law. *Id.* at 374–75. But in 1974 Texas enacted a new Penal Code with a new enhancement statute. *See id.* at 375. The new enhancement statute, then as now, allowed any “felony” conviction to be used for enhancement. *Id.*; Tex. Penal Code § 12.42(a).

The Penal Code defined *felony*, then as now, as “an offense so designated by law or punishable by death or confinement in a penitentiary.” *Ex parte Blume*, 618 S.W.2d at 375–76; Tex. Penal Code § 1.07(a)(23). The Penal code further defined *law*, then as now, to include “a statute of this State or of the United States.” *Ex parte Blume*, 618 S.W.2d at 376; Tex. Penal Code § 1.07(a)(30).

Additionally, another section of the new Penal Code, then as now, classified “any conviction not obtained from a prosecution under this code” as a third-degree felony under Texas law if “confinement in a penitentiary” was a possible punishment for the offense. *Ex parte Blume*, 618 S.W.2d at 376; Tex. Penal Code § 12.41(1).

The federal law under which Blume had been convicted allowed for a punishment of confinement in a U.S. penitentiary for up to five years. *Ex parte Blume*, 618 S.W.2d at 376. Consequently, Blume’s federal conviction was a felony under Texas law that could be used to enhance his sentence. *Id.*

The Court noted that its earlier decision in *Montgomery* (and in another case called *Smith*) relied on “the rule announced under the old code; i.e., a felony under Federal law must be an offense which is denounced as a felony under Texas law.” *Id.* But the *Montgomery* and

Smith Courts had “neglected to consider the effect of the new Penal Code.” *Id.* Accordingly, the Court held that, “*Insofar as Montgomery and Smith turn on the application of this [old] rule, they are overruled.*” *Id.* (emphasis added).

As that passage makes clear, the *Blume* Court did not overrule *Montgomery* in its entirety. It overruled only its application of the old enhancement rule, which had been supplanted by the new Penal Code. It did not overrule *Montgomery*’s interpretation of the Penal Code’s definition of *government*. That interpretation remains good law that binds this Court. *See Dean v. State*, 449 S.W.3d 267, 269 (Tex. App.—Tyler 2014, no pet.) (recognizing *Montgomery* as good law and holding that the Penal Code’s definition of *government* doesn’t include the federal government).

B. Binding precedent aside, *Montgomery*’s interpretation of “the state” is the correct interpretation

The *Montgomery* Court didn’t explain why it interpreted “the state” to mean only “the State of Texas.” *Montgomery*, 517 S.W.2d at 19. It apparently considered that interpretation self-evident.

Putting aside the fact that *Montgomery* is binding precedent, there are several reasons why its interpretation of “the state” is the right one.

i. In other statutes, the legislature uses “the state” to refer to Texas and “the United States” to refer to the United States

First, the legislature knows how to distinguish the United States from the State of Texas when it wants to. Elsewhere in the Penal Code and in numerous other statutes, the legislature uses the term “the state” to refer to Texas and “the United States” to refer to the United States. *See, e.g.*, Tex. Penal Code § 8.06(b) (defining *law enforcement agent* to include “personnel of the state ... as well as of the United States”); *id.* § 32.54(a)(1) (distinguishing military service records “in the armed forces of the United States” from “the state military forces”); Tex. Agric. Code § 167.057(b) (“The state, an agency of the state, or an agency of the government of the United States ...”); Tex. Gov’t Code § 432.165(1)(A) (allowing Texas military personnel to be court-martialed if they make a fraudulent claim “against the United States, the state, or an officer of the United States or the state”); Tex. Loc. Gov’t Code § 241.004(2) (referring to airports “used by the state or ... by the United States”); Tex. Parks & Wildlife Code § 23.034(a) (“The state reserves a preferential right, without consideration to the United States, to lease all mineral rights ...”); Tex. Transp. Code § 22.071(5) (defining *public agency* to include “an agency of the state or of

the United States”); Tex. Water Code § 58.165(a) (allowing various Texas entities to construct water distribution system improvements “outside the state or the United States.”).

It’s not surprising that the legislature regularly distinguishes “the state” from “the United States.” The Texas Legislature passes laws to regulate Texas agencies, counties, cities, and districts—not the federal government. So it makes sense that the legislature would use the general term “the state” to refer to the State of Texas. *See State v. Heath*, 696 S.W.3d 677, 694 (Tex. Crim. App. 2024) (interpreting the Michael Morton Act’s undefined use of the term “the state” to mean “the State of Texas”) (“Any general reference to the ‘state’ refers to the State of Texas ... ”).

Indeed, when the legislature has wanted *state* to include entities other than the State of Texas, it has expressly defined *state* to include them. *See, e.g.*, Tex. Ins. Code § 2201.002 (defining *state* to mean any state of the United States and the District of Columbia); Tex. Prop. Code § 240.002 (defining *state* to include any state of the United States, any U.S. territory, and Indian tribes recognized by federal law); Tex. Transp. Code § 523.003(6) (defining *state* to include any state of the

United States, Puerto Rico, the District of Columbia, and any U.S. territory).

ii. **The interpretive canon *noscitur a sociis* indicates that “the state” means “the State of Texas”**

Under the canon *noscitur a sociis*, “the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.” *Harris County v. Eaton*, 573 S.W.2d 177, 181 (Tex. 1978).

The words that follow “the state” in subsection B of the Penal Code’s definition of *government*—“a county, municipality, or political subdivision of the state”—describe progressively smaller parts of the State of Texas. Tex. Penal Code § 1.07(a)(24)(B). After the State of Texas itself, the next smallest political entities are counties followed by cities and other political subdivisions (e.g., school districts).³

³ “Political subdivision” is a term of art that appears in the Texas Constitution and many Texas statutes. *See, e.g.*, Tex. Const. art. III, § 52(e) (“A county, city, town, or other political corporation or subdivision of the state may invest its funds as authorized by law.”); Tex. Elec. Code § 144.001 (“This chapter applies to a candidate for an office of a political subdivision other than a city or county.”); Tex. Tax Code § 101.008 (“No city, county, or other political subdivision may levy an occupation tax imposed by this title unless specifically permitted to do so by state law.”).

The Texas Supreme Court has defined *political subdivision* to mean an entity that has “jurisdiction over a portion of the State [of Texas]” whose members are “elected in local elections or are appointed by locally elected officials.” *Guaranty Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 531 (Tex. 1980). Political

The same descending order appears in subsection C’s definition: “any branch or agency of the state, a county, municipality, or a political subdivision.” *Id.* § 1.07(a)(24)(C). Statewide Texas agencies have the largest geographical jurisdiction followed by counties, cities, and political subdivisions.⁴

Following *noscitur a sociis*, this descending order is strong evidence that “the state” means “the State of Texas.”

Interpreting “the state” in this way also makes the text flow naturally and gives “the state” one meaning throughout the definition.

On the other hand, if “the state” means both the State of Texas and the United States, the statute would read awkwardly.

Take subsection B, which would read as “a county, municipality, or political subdivision of [the State of Texas or the United States].” Tex. Penal Code § 1.07(a)(24)(B). The sizes would go downward and then simultaneously both upward and downward. Texas political subdivisions are generally smaller than counties and cities, but political subdivisions of the United States include the forty-nine other states

subdivisions include entities such as school districts and navigation districts. *Id.* at 530–31.

⁴ See *Guaranty Petroleum Corp.*, 609 S.W.2d at 531 (“A political subdivision has jurisdiction over a portion of the State; a department, board or agency of the State exercises its jurisdiction throughout the State.”)

(larger), U.S. territories like Puerto Rico and Guam (larger), and counties, cities, and school districts in the forty-nine other states and U.S. territories (smaller).

It beggars belief that the Texas Legislature would have used the well-understood term of art *political subdivision* in this one instance to mean not just small political entities in Texas but also political entities as widespread and diverse as the State of Maine (“a political subdivision of [the United States]”); Utqiagvik, Alaska (“a ... municipality ... of [the United States]”); Congress (“any branch ... of [the United States]”); the Department of Defense (“any ... agency of [the United States]”); and the American Samoa Department of Education (“any ... agency of ... a political subdivision”).

C. If the meaning of “the state” is ambiguous, then the rule of lenity advises that it should be interpreted to mean “the State of Texas”

The rule of lenity is an interpretive cannon that says courts should interpret ambiguous terms in a criminal law in the defendant’s favor.

See Cuellar v. State, 70 S.W.3d 815, 819 n.6 (Tex. Crim. App. 2002).

If this Court were to conclude that *Montgomery* isn’t binding (it is) and that “the state” is ambiguous (it isn’t), then the rule of lenity

counsels that this Court should interpret "the state" to mean "the State of Texas" because that interpretation is the one that benefits Appellant.

2. Two appellate cases have held that "the state" means more than just "the State of Texas," but they're wrong

A. *Rice v. State*

Rice v. State involved a defendant who was convicted of impersonating a public servant for wearing a Louisiana Department of Corrections uniform and falsely claiming to be a Louisiana Department of Corrections employee. 195 S.W.3d 876, 878–79 (Tex. App.—Dallas 2006, pet. ref'd).

On appeal, Rice argued that the evidence was insufficient to support his conviction because "the state" in the Penal Code's definition of *government* means "the State of Texas," so he could only be convicted for impersonating a State of Texas employee, not a State of Louisiana employee. *Id.* at 881.

The court disagreed. *Id.* at 881–82. It looked to the definition of *state* in two Webster's dictionaries, which defined *state* variously as "a body politic organized for civil rule and government," a "political organization that has supreme civil authority and political power and serves as the basis of government," or "any of the bodies politic or political units that together make up a federal union, as in the United

States of America.” *Id.* at 881 (internal quotation marks and citations omitted). The court combined these definitions to hold that the word *state* means any “political body, organization, or unit organized for civil rule and government.” *Id.*

Using its new definition, the court held that the State of Louisiana met that definition and was therefore a state under the Penal Code’s definition of *government*. *Id.*

The court further justified its decision by noting that the purpose of the Penal Code is to ensure “the safety of the public” and that the public would not be safer if the law allowed people to impersonate non-Texas government officials. *Id.* (citing Tex. Penal Code § 1.02)). The court also reasoned that interpreting the public servant impersonation law to include only Texas officials “would lead to absurd consequences.” *Id.* at 882.

There are several reasons why *Rice* was wrongly decided.

i. *Rice* ignores and contradicts *Montgomery*

The Court of Criminal Appeals made clear in *Montgomery* that “the state” does “not include the federal government, but only the state, counties, municipalities, or political subdivisions of the state.” *Montgomery v. State*, 571 S.W.2d 18, 19 (Tex. Crim. App. 1978). But

under *Rice*'s definition of *state*, the federal government would also be included because it is a “political body, organization, or unit organized for civil rule and government.”

Because *Rice*'s definition contradicts *Montgomery*, it's wrong.

ii. *Rice* doesn't grapple with the rest of the statutory text

“Statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (internal quotation marks and citation omitted).

There's nothing wrong with looking to a dictionary definition to help discern the meaning of a word. But words change their meanings depending on context.

For example, assume a club has a posted sign that says “No chairs are allowed on the dance floor.” One could argue that because one dictionary definition of *chair* is “a deliberative assembly’s presiding officer” the sign means that you can’t twerk with Speaker of the House Mike Johnson. *See Black’s Law Dictionary* 286 (12th ed. 2024). But that interpretation ignores the obvious context.

So too with the word *state*. In some contexts, *state* can mean any of the fifty states of the United States of America. But the statutory context here shows that *state* refers only to the State of Texas.

First, the Penal Code's definition of *government* doesn't use the word *state*, it uses the term "the state." Tex. Penal Code § 1.07(a)(24)(A)–(C). The use of the definite article *the* with a singular noun like *state* indicates that the term refers to only one state, not two or more. *Totalenergies E&P USA, Inc. v. MP Gulf of Mex., LLC*, 667 S.W.3d 694, 709–10 (Tex. 2023). It would indeed be strange for the legislature to a singular, definite phrase like "the state" to mean all fifty states instead of "any state," "the states," or "each state of the United States."

Second, *Rice*'s definition of *state* ignores the Texas Legislature's limited jurisdiction. The Texas Legislature passes criminal laws to protect people within the borders of the State of Texas. *See Sabatino v. Goldstein*, 649 S.W.3d 841, 848 (Tex. App.—Houston [1st Dist.] 2022), *aff'd* 690 S.W.3d 287, 296 (Tex. 2024). A person's conduct outside the State of Texas can't even violate Texas criminal law unless it has some effect inside Texas. *See* Tex. Penal Code § 1.04(a)(1)–(4). In other words, Texas criminal laws are focused on what happens in Texas.

It makes sense, then, that the legislature would use the word *state* in the Penal Code to refer to Texas, not any state in the United States.

But under *Rice*'s broad definition of *state*, that backdrop of limited criminal jurisdiction goes out the window. Such an interpretation would mean that the Texas Penal Code imposes procedural rules on prosecutors in other U.S. states and foreign countries. *See id.* § 3.02(b) (requiring “the state” to give thirty days’ written notice to try multiple charging instruments in a single trial) and § 3.02(c) (limiting the circumstances in which “the state” can join new offenses in a subsequent prosecution).

iii. *Rice*'s public safety concerns can't override the plain meaning of the text

Policy arguments cannot—and should not—override a statute’s plain language. *Sandoz Inc. v. Amgen Inc.*, 137 S.Ct. 1664, 1678 (2017).

Though interpreting “the state” to include non-Texas entities would protect the public from people who impersonate non-Texas government officials, that laudable policy outcome cannot supersede the plain meaning of “the state.” Interpreting “the state” to mean only the State of Texas doesn’t disregard the Penal Code’s purpose of protecting the public’s safety; it just means that when it comes to the

crime of impersonating a public servant, that protection is limited to the impersonation of Texas officials.

The remedy for this narrow scope isn't stretching the statutory language beyond what is sensible—it's petitioning the legislature to amend the statute.

iv. Interpreting “the state” to mean only the State of Texas doesn’t lead to absurd consequences

The *Rice* court didn't explain how interpreting “the State” to mean only the State of Texas would lead to absurd consequences. *See Rice*, 195 S.W.3d at 882. It probably didn't because such an interpretation doesn't lead to absurd consequences.

Perhaps the court believed that it would be “absurd” to criminalize impersonating a Texas government employee but not a Louisiana government employee. But if a statute criminalizes some behavior but not others, that doesn't make the statute absurd—it just makes it limited in scope.

That's normal for criminal laws. The Controlled Substances Act isn't absurd because it doesn't list all possible harmful drugs. *See Lovorn v. State*, 536 S.W.2d 356, 357 (Tex. Crim. App. 1976) (reversing a drug conviction because the drug wasn't listed in the Controlled Substances Act). Nor is the engaging in organized crime statute absurd because it

doesn't list all crimes as predicate offenses. *See Hughitt v. State*, 583 S.W.3d 623, 624–25 (Tex. Crim. App. 2019) (reversing an engaging in organized crime conviction based on an offense not listed as a predicate offense). It just means that these criminal laws—like practically every law—contain gaps that can be filled in by subsequent legislation.

What does lead to absurd consequences, however, is *Rice*'s expansive interpretation of “the state.” As explained above, that interpretation leads to the Penal Code regulating the conduct of government officials in other states and countries.

B. *Calhoun v. State*

Calhoun v. State concerned a defendant who was convicted of impersonating a public servant under the law of parties for participating in a robbery in which her codefendant pretended to be an FBI agent. No. 14-09-00936-CR, slip op. at 2–4 (Tex. App.—Houston [14th Dist.] Feb. 8, 2011, no pet.) (mem. op., not designated for publication).

On appeal, Calhoun argued that the evidence was insufficient to support her conviction because FBI agents aren't public servants under Texas law. *Id.* at 6.

Quoting extensively from *Rice*, the court rejected Calhoun's argument. *Id.* at 7–8, 12. It reasoned that *Rice*'s broad definition of *state* included the federal government. *Id.* at 8, 12.

i. *Calhoun isn't binding on this Court and is wrong for the same reasons Rice is wrong*

Calhoun doesn't bind this Court because it's an unpublished opinion. Tex. R. App. P. 47.7(a).

But binding or not, this Court shouldn't follow *Calhoun* for the same reasons it shouldn't follow *Rice*. The *Calhoun* court didn't cite or discuss the Court of Criminal Appeals' binding decision in *Montgomery*. And instead of independently analyzing the Penal Code's definition of *government*, it merely parroted *Rice*'s erroneous reasoning.

3. The remedy is to reform Appellant's judgment to the lesser-included offense of aggravated assault and remand the case for a new punishment hearing

Because Special Agent Dugger, a federal agent, was not a public servant under Texas law, the evidence was legally insufficient to convict Appellant of aggravated assault on a public servant.

The evidence was sufficient, however, to convict Appellant of the lesser-included offense of aggravated assault.

Aggravated assault of a public servant is a first-degree felony, punishable by between five years and life in prison. Tex. Penal Code §§

12.32(a), 22.02(b)(2)(B). Enhanced with his prior felony conviction, Appellant's punishment range was fifteen years to life in prison. *Id.* § 12.42(c)(1).

Aggravated assault is a second-degree felony, punishable by between two and twenty years in prison. *Id.* §§ 12.33(a), 22.02(b). Enhanced by his prior felony conviction, Appellant's punishment range for aggravated assault is five years to life in prison. *Id.* § 12.42(b).

The trial court sentenced Appellant to twenty-five years in prison. (CR 197, 8 RR 4.) It is possible that the court would have sentenced Appellant to less than twenty-five years had the minimum for his offense been five years instead of fifteen years.

When the evidence is insufficient to support a conviction for a greater offense but sufficient to support a conviction for a lesser-included offense, an appellate court must reform the judgment to reflect a conviction for the lesser and remand the case for a new punishment hearing. *Lee v. State*, 537 S.W.3d 924, 927 (Tex. Crim. App. 2017).

The court must remand for a new punishment hearing even when, as here, a defendant's sentence for the greater offense falls within the punishment range for the lesser offense. *See, e.g., Ross v. State*, 9 S.W.3d 878, 881, 884 (Tex. App.—Austin 2000, pet. ref'd) (defendant

sentenced to seven years in prison for engaging in organized crime, case remanded for new punishment hearing on lesser-included offense of aggravated assault); *Flores v. State*, 888 S.W.2d 187, 193 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (defendant sentenced to four years in prison for third-degree felony auto theft, case remanded for new punishment hearing on lesser-included offense of third-degree felony unauthorized use of a motor vehicle).

Conclusion and Prayer

Special Agent Dugger could be a public servant under the Penal Code only if he was “an officer, employee, or agent of government.” Tex. Penal Code § 1.07(a)(41)(A). But the Penal Code defines *government* to mean “the state,” i.e. the State of Texas. Tex. Penal Code § 1.07(a)(24)(A). Because Dugger was a U.S. federal government agent, there was insufficient evidence for the jury to convict Appellant of aggravated assault on a public servant.

Appellant therefore requests that the Court reform Appellant’s judgment to reflect a conviction for the lesser-included offense of aggravated assault and remand the case for a new punishment hearing.

Respectfully submitted,
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