No. 01-24-00167-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

RICKY SHARROD BROWN
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1684666
From the 337th District Court of Harris County, Texas
Hon. Denise Bradley & Hon. Reagan Clark, Judges Presiding

BRIEF FOR THE APPELLANT

Oral Argument Requested

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PRESIDING JUDGES:	Hon. Denise Bradley Hon. Reagan Clark 337th District Court Harris County, Texas 1201 Franklin St. Houston, Texas 77002

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STATEMENT OF THE CASE

On October 20, 2020, Ricky Brown (Appellant) was charged by indictment with murder, a first-degree felony. (C.R. 35).[1] Appellant pled not guilty and proceeded with a trial by jury. A jury found Appellant guilty, Appellant pled true to two enhancement paragraphs, and the court sentenced him to life with parole in the Texas Department of Criminal Justice – Correctional Institutions Division. (C.R. 530-32). The trial court certified Appellant's right of appeal and he timely filed notice of appeal. (C.R. 536-38).

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument.

ISSUES PRESENTED

Issue I: Appellant was deprived of due process and an impartial judge under amendments V and XIV of the United States Constitution and article 1, § 10 of the Texas Constitution. This is structural error.

Issue II: The trial court failed to properly instruct the jury by instructing that it was permitted rather than required to acquit in the self-defense paragraphs of the jury charge. It used the word "should" rather than "must" which amounts to a misstatement of law that rises to the level of structural error.

Issue III: The trial court erred in denying Appellant's motion to suppress evidence derived from the warrantless search of his apartment he shared with the complainant in violation of the Fourth Amendment to the United States Constitution and Article 1, § 9 of the Texas Constitution.

Issue IV: If this Court finds defense counsel failed to preserve the motion to suppress, then defense counsel rendered ineffective assistance of counsel in doing so, depriving Appellant of his right to effective assistance of counsel.

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

Issue V: Defense counsel rendered ineffective assistance of counsel in failing to preserve a Confrontation Clause objection to the admission of absent witness Paul Hopkins's statements.

Issue VI: Defense counsel rendered ineffective assistance of counsel in failing to object to, and request a redaction of, Appellant's reference to and invocation of his right to an attorney, as well as his refusal to consent to a DNA swab.

STATEMENT OF FACTS

Ricky Sharrod Brown, Appellant, was accused of murdering the complainant, Derick Randle, by firearm. Appellant and the complainant were a couple. (5R.R. 20, 23-24). They lived together long-term. (5R.R. 10, 20, 23-24, 27-29, 35-38, 66-74). One night, the complainant was shot and passed away due to his injuries; Appellant claimed he shot the complainant in self-defense because the complainant attacked him with a hammer. (9R.R. St. Ex. 122; 4R.R. 87).

The Motion to Suppress

Detectives searched the apartment shared by Appellant and the complainant with a warrant and did not find anything of interest. (5R.R. 56). There was also a second search, which was the subject of a mid-trial motion to suppress. The first warrant's last valid day was on the 16th; on that day, they were informed the family wanted to move things out of the apartment on the 19th. (5R.R. 59-60). Brady testified they did not get another warrant because they believed the apartment was abandoned and because family and the apartment manager apparently gave "consent." (5R.R. 56). With that

second search, they found possible blood stains and a bottle of bleach in the apartment during the second search. (4R.R. 245-48).

Judge Clark began questioning Brady about why he and his team conducted the second search without even attempting to obtain a second warrant. (5R.R. 61-64). Detective Brady contended that on the 17th, he and his partner received information that led them to believe there was evidence in the complainant's and Appellant's apartment they somehow missed the first time around. (5R.R. 61-62). They found out on the 16th that the complainant's family was going to the unit to remove his things. (5R.R. 61-62). The trial court elicited from Brady that he could have gone back to get another warrant but did not. (5R.R. 62). When prodded, Brady said there was some concern about timing because the family was coming to remove items and because there was some delay in getting the first warrant signed. (5R.R. 62-64). The trial court denied the motion to suppress, ruling that Appellant had no standing, valid consent was given, and that there were exigent circumstances. (5R.R. 102).

Absent Witness Paul Hopkins

The State offered into evidence some alleged statements from a non-testifying witness named Paul Hopkins at several points at trial. (4R.R. 78-80, 244-45, 247; 5R.R. 61, 116, 121). Brady testified his team learned from Hopkins that the complainant's body was taken into the apartment that was searched. (4R.R. 244). Brady stated his team "received a tip that we needed to speak with an individual." (4R.R. 249). Detectives claimed Hopkins said he assisted Appellant in disposing of the complainant's body.

(4R.R. 79; 5R.R. 61). He stated that the information from Hopkins led detectives to return to the apartment for the second search (after they had previously searched the same apartment with a warrant and somehow did not find anything of interest). (4R.R. 79). There were multiple references made to the information/statements allegedly given by Hopkins. (4R.R. 79, 249; 5R.R. 61).

The Interrogation Video and Appellant's Invocations

The State offered into evidence a video showing a police interrogation of Appellant. (9R.R. St. Ex. 122). During that interrogation, Appellant mentioned potentially getting an attorney, and later in the interrogation he invoked his right to an attorney and refused consent to a DNA swab. *Id.* at 1:09:55-1:10:00, 1:21:34-1:21:56. Defense counsel objected to the video as whole on inadequate predicate grounds, which was denied. (4R.R. 58). Later in the trial, the State referenced these invocations and defense counsel objected to these references as "unconstitutional." (4R.R. 116-17).

SUMMARY OF THE ARGUMENT

Issue I: Appellant's fundamental right to an impartial judge and due process was violated when the trial judge, Honorable Reagan Clark, abandoned his role as a neutral arbiter and became an advocate for the State. He did so when, at hearing on Appellant's motion to suppress, he resumed the State's questioning of Detective Brady and got him to change his answer to the question of why he and his team returned to the apartment without a warrant. Brady originally testified they could have applied for another warrant

but did not want to because they thought the apartment was abandoned. Judge Clark pressed him on this issue with leading questions about whether detectives were concerned about the family coming and removing evidence from the apartment a couple of days later. Originally stating that the fact that family was coming to remove items from the apartment did not set off any "alarm bells" for him, he changed course at the judge's behest and stated they were concerned about the timing of the family coming to move things out. Judge Clark then used these evolved answers, elicited by his own hand, to rule that the warrantless search was justified because of exigent circumstances in case his rulings on standing and third-party consent did not stick. In becoming an advocate for the State, Appellant was deprived of his right to an impartial judge. This error is structural, and no harm analysis is required.

Issue II: The court erred in instructing the jury it "should" acquit rather than using "must" or "will" because the language used was permissive rather than mandatory. Because it is the State's burden to disprove self-defense beyond a reasonable doubt, the "should" language violated Appellant's presumption of innocence. This is structural error, so a reviewing court need not engage in the "egregious harm" analysis.

Issue III: The trial court erred in denying Appellant's motion to suppress the evidence derived from the second search of the apartment, which was warrantless. Appellant had standing—or a "reasonable expectation of privacy"—in this apartment because he lived there with the complainant and continued living there after the complainant's death. Multiple witnesses testified Appellant lived there, so the trial court's finding he did not

prove he had a reasonable expectation of privacy was an abuse of discretion. Regarding consent and exigent circumstances, the record does not at all show that the apartment manager or the family of the complainant had authority to consent to the search or that it would have been reasonable for the police to think they did. The record also does not show exigent circumstances. Any evidence derived from the blood stains and bleach bottle found in that second search should have been suppressed, and this error was not harmless beyond a reasonable doubt.

Issue IV: If this Court determines the motion to suppress was waived, then trial counsel rendered ineffective assistance in failing to preserve it. It could not have been reasonable trial strategy to fail to properly preserve this issue given that defense counsel spent considerable time and energy trying to keep out the fruits of the warrantless search. There was prejudice under *Strickland* because it was/would have been error for the trial court to deny the motion to suppress.

Issue V: Trial counsel rendered ineffective assistance of counsel in failing to adequately preserve any issue regarding deceased witness Paul Hopkins's statements to police regarding his alleged part in helping Appellant allegedly dispose of the complainant's body and that there would be evidence in the apartment. Admission of these statements violated Appellant's right under the confrontation clause because they were testimonial. There was clearly no strategic reason to fail to timely object to statements allegedly made by Hopkins because defense counsel objected to these statements at other points at trial. The trial court even sustained a confrontation objection to these statements. It

would have been error on the part of the trial court to overrule that same objection earlier in the trial when the State initially elicited these statements.

Issue VI: Defense counsel rendered constitutionally deficient assistance of counsel when he failed to object on constitutional grounds to Appellant's invocation of his right to counsel and his refusal of consent to provide a DNA sample during his video-recorded interrogation by police. Regarding the performance prong of Strickland, the record is clear there was no strategic reason counsel had for failing to object to these statements because he made clear he did not want those items in evidence by objecting to the video as a whole on other grounds. He also objected to the State's later reference of those invocations, but it was too late. As for prejudice, the trial court would have erred in overruling an objection to the admission of these invocations since they are not admissible as to the guilt of a defendant. These invocations are highly prejudicial by their nature.

ARGUMENT

Issue I: Appellant was deprived of due process and an impartial judge under amendments V and XIV of the United States Constitution and article 1, § 10 of the Texas Constitution. This is structural error.

Appellant was deprived of his right to an impartial judge and due process; this became apparent when the trial court—Judge Clark—took over the State's questioning of an investigating officer to try and elicit whether there were exigent circumstances justifying a warrantless search.

The court conducted a hearing on defense counsel's mid-trial motion to suppress outside the presence of the jury. (5R.R. 10-104). The State's position on the validity of the search was that Appellant did not have standing; valid consent to the search was given by people who did not live or stay in the apartment; and that there were exigent circumstances justifying the search. (5R.R. 85-86).

The State put Detective Brady on the stand to testify about his investigation into the complainant's shooting death. (5R.R. 55). Detectives conducted two searches: the first was with a warrant on June 13th. (5R.R. 55-56). The warrant's last valid day was on the 16th; on that day, they were informed the family wanted to move things out of the apartment on the 19th. (5R.R. 59-60). Brady testified they did not get another warrant because they believed the apartment was abandoned and because family apparently gave "consent." (5R.R. 56). With that second search, they found possible blood stains and a bottle of bleach in the apartment during the second search. (4R.R. 245-48).

Judge Clark, apparently deciding the State had not done enough to show exigent circumstances, began questioning Brady about why he and his team conducted the second search without even attempting to obtain a second warrant. (5R.R. 61-64). Detective Brady contended that on the 17th, he and his partner received information that led them to believe there was evidence in the complainant's and Appellant's apartment they somehow missed the first time around. (5R.R. 61-62). They had found out on the 16th that the complainant's family was going to the unit to remove his things.

(5R.R. 61-62). The trial court elicited from Brady that he could have gone back to get another warrant but did not. (5R.R. 62).

Judge Clark took this line of questioning a step further and the following exchange occurred:

> THE COURT: Was there some concern that if you didn't do that that whatever information that you had about evidence being in that apartment might be removed by the family? Was that of some concern to you?
>
> THE WITNESS: Yes, we wanted to get there before the family was cleaning it up, on the 19th.
>
> THE COURT: And I believe, if I recall your testimony, that you had some difficulty in obtaining the search warrant the first time, the first search warrant because the judge was --
>
> THE WITNESS: Correct.
>
> THE COURT: -- delayed -- I don't want to get too -- delayed in -- you went to him and said come back the next day and then it was the end of the next day before you got a search warrant.
>
> THE WITNESS: Correct. We wrote it on the 11th and he finally signed it on the morning of the 13th.
>
> THE COURT: Was that thought in your mind that that could very well happen again and that possibly you'd lose the opportunity to obtain some evidence because the family removed it, was that of some concern?
>
> THE WITNESS: Yes.
>
> THE COURT: Is that one reason why you didn't go back and get a search warrant?
>
> THE WITNESS: Yes, we -- yes.
>
> THE COURT: So I guess what you're saying is -- I don't want to put words in your mouth, I'll just ask you -- are you saying that because of the additional information that you obtained in your investigation about property being in that apartment and your knowledge that the family was wanting to get in there to remove the contents of the apartment and the difficulty that you had in obtaining a warrant the first time and your feeling that the apartment had been abandoned, that the apartment project manager had control of the property, that's the reason you didn't get a search warrant; is that correct or incorrect?

THE WITNESS: That is correct.

(5R.R. 62-64).

Later, after Appellant testified that he lived in that apartment until July when the apartment manager changed the locks, the trial court posed some additional questions. Judge Clark asked Appellant to recall in his statement to detectives that he had not seen the complainant in one and a half years, yet testified in court they were a couple, to which Appellant replied, "Yes, sir." (5R.R. 81). He then asked, "In fact, you told the detective that you tried to stay away from him because he was always coming on to you and you didn't like that and you didn't roll that way, something along those lines; is that right?" (5R.R. 82). He followed up with, "And you told him that over and over and over." (5R.R. 82). Appellant replied, "Yes, sir." (5R.R. 82). Judge Clark then asked, "So are you lying now or were you lying then?" (5R.R. 82).[2]

A. Applicable Law and Standard of Review

The federal and state constitutions guarantee the rights to due process and a fair trial. U.S. CONST. amends. V, VI & XIV; TEX. CONST. art. I, § 10. "Due process requires a neutral and detached hearing body or officer." *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006), citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an

[2] The court then denied the motion to suppress, in part on the ground that exigent circumstances existed to justify the search and that Appellant did not have standing (and third, that consent was given by people who did not live at the apartment). (5R.R. 102-04). This is the basis of another issue on appeal, *infra* Issue III.

absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136 (1955). "A defendant has an absolute right to an impartial judge at both the guilt/innocence and punishment stages of trial." *Segovia v. State*, 543 S.W.3d 497, 503 (Tex. App.—Houston [14th Dist.] 2018, no pet.). And "[r]egardless of any actual bias, a judge may be disqualified due to an appearance of impropriety." *Ex parte Lewis*, 688 S.W.3d 351, 352 (Tex. Crim. App. 2024) (citation omitted).

A judge may pose questions to witnesses to clarify a point. *Brewer v. State*, 572 S.W.2d 719, 721 (Tex. Crim. App. 1978) (explaining clarifying questions are fine when posed with an "impartial attitude"). However, this does not permit him to abdicate his role as an impartial arbiter and act as an advocate for the State. *Dockstader v. State*, 233 S.W.3d 98, 108 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) ("A judge should not act as an advocate or adversary for any party."). That a jury is not present does not defeat a claim of deprivation of an impartial judge—if a jury was not present for the complained-of behavior, a court looks "to whether, in the zeal of active participation, the trial judge became an advocate in the adversarial process and lost the neutral, detached role required for a judge." *Hunter v. State*, 691 S.W.3d 247, 252 (Tex. App.—Dallas, 2024, no pet.) (citation omitted).

"No matter what evidence is against a defendant, the United States Constitution guarantees the defendant the right to an impartial judge." *Abdygapparova v. State*, 243 S.W.3d 191, 209-10 (Tex. App.—San Antonio 2007, pet. ref'd), citing *Blue v. State*, 41 S.W.3d 129, 138 (Tex. Crim. App. 2000) (Mansfield, J., concurring). "The United States

Supreme Court has repeatedly held that a violation of the right to an impartial judge is a structural error that defies harm analysis." *Id.*, citing *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *Chapman v. California*, 386 U.S. 18, 23 (1967); *Tumey v. Ohio*, 273 U.S. 510 (1927).

The mere "presence on the bench of a judge who is not impartial deprives a defendant of his basic protections and infects the entire trial process from beginning to end." *Abdygapparova*, 243 S.W.3d at 209, citing *Fulminante*, 499 U.S. at 309–10 (internal quotation marks omitted); *see also Tumey*, 273 U.S. at 535 ("No matter what the evidence was against [Appellant], he had the right to an impartial judge."). "The constitutional deprivation of an impartial judge affects the 'framework within which the trial proceeds' and prevents the criminal trial from 'reliably serv[ing] its function as a vehicle for determination of guilt or innocence.'" *Abdygapparova*, 243 S.W.3d at 209, quoting *Fulminante*, 499 U.S. at 310.

B. Analysis

i. Preservation

The Court of Criminal Appeals has "explained that 'our system may be thought to contain rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request.'" *Garcia v. State*, 149 S.W.3d 135, 144 (Tex. Crim. App. 2004), quoting *Marin v. State*, 851 S.W.2d 275,

279 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997).

Category two rights "do not vanish so easily. Although a litigant might give them up and, indeed, has a right to do so, he is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record." *Id.*, citing *Marin*, 851 S.W.2d at 280. "Regarding these rights, 'the judge has an independent duty to implement them absent an effective waiver by him. As a consequence, failure of the judge to implement them at trial is an error which might be urged on appeal whether or not it was first urged in the trial court." *Id.*

The Court of Criminal Appeals has "characterized *Marin* as holding 'that the general preservation requirement's application turns on the nature of the right allegedly infringed," *Proenza v. State*, 541 S.W.3d 786, 796 (Tex. Crim. App. 2017), quoting *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014) and *Ex parte Heilman*, 456 S.W.3d 159, 165-166 (Tex. Crim. App. 2015). "That is, a proper determination of a claim's availability on appeal should not involve peering behind the procedural-default curtain to look at the particular 'circumstances' of the claim's merits within the case at hand." *Id.* Error in this case may be reviewed without a timely objection because the due process right to an impartial judge is at least a category two *Marin* right. The Court of Criminal Appeals appears to agree. *See Unkart v. State*, 400 S.W.3d 94 (Tex. Crim. App. 2013), citing *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2010) (plurality op.).

It has long been held that "[t]he law contemplates that the trial judge shall maintain an attitude of impartiality throughout the trial." *Proenza*, 541 S.W.3d at 797 n. 71, quoting *Lagrone*, 209 S.W. at 415.[3] Many of the reasons articulated in *Proenza* in determining that an alleged violation of Article 38.05 (improper judicial comment) implicates a category two *Marin* right apply in this instance. In *Proenza*, the Court of Criminal Appeals noted that "*Marin's* description of the adversarial system depends upon, or at the very least assumes, the decision-maker's impartiality." *Id.* at 799. "[T]he utility associated with enforcement of forfeiture never outweighs 'fundamental systemic requirements or . . . rights so important that their implementation is mandatory absent an express waiver.'" *Id.*, quoting *Marin*, 851 S.W.2d at 280.

The Court of Criminal Appeals also acknowledged that "when the trial judge's impartiality is the very thing that is brought into question, *Marin's* typical justification for requiring contemporaneous objection loses some of its potency." *Proenza*, 541 S.W.3d at 799. *See also Kerr v. State*, No. 07-19-00338-CR, 2020 Tex. App. LEXIS 8763 at *20-21 (Tex. App.—Amarillo Nov. 9, 2020, pet. ref'd) (mem. op., not designated for publication) (Quinn, C.J., concurring) ("The presence of an unbiased judge, that is, one who acts upon the law and facts, as opposed to ill-will, is elemental to a sound and

[3] In *Blue v. State*, the Court of Criminal Appeals "granted relief on an improper judicial-comment that was not preserved at trial, though [the Court of Criminal Appeals was] unable to agree on a rationale." *Unkart*, 400 S.W.3d at 100, citing *Blue*, 41 S.W.3d. "A plurality of the Court decided that the trial judge's remarks vitiated the defendant's presumption of innocence. Judge Mansfield, who was part of the plurality, also filed a concurring opinion, in which he concluded that the doctrine of procedural default 'does not apply to statements made by a trial judge that rise to the level of fundamental error.' Judge Keasler concluded that the trial judge's remarks were so egregious as to show that he was biased." *Id.*

lasting system of justice. Indeed, the jurist has an independent duty to implement and assure the existence of that component without the need for a litigant to request it."). *See also Proenza*, 541 S.W.3d at 798.

Other factors that lend in favor of allowing this type of error to be raised for the first time on appeal include the fear that a judge would have an animus or ill will against a defendant and allowing the forfeiture regarding improper comments that implicate due process concerns would allow the public to view the proceedings as unfair. *See Proenza*, 541 S.W.3d at 799-801 (failing to review such a weighty claim as an improper judicial comment simply because of inaction "has the potential of shaking the public's perception of the fairness of our judicial system and breeding suspicion of the fairness and accuracy of judicial proceedings") (internal quotation marks and citations omitted).

Furthermore, the "[t]he United States Supreme Court has determined that when certain constitutional rights are violated, fundamental error occurs." *Williams v. State*, No. 14-19-00979-CR, 2021 Tex. App. LEXIS 9594 at *4 (Tex. App.—Houston [14th Dist.] Dec. 2, 2021, pet. ref'd) (mem. op., not designated for publication), citing *Fulminante*, 499 U.S. at 309-310 and *Williams v. State*, 194 S.W.3d 568, 579 (Tex. App.—Houston [14th Dist.] 2006), *aff'd*, 252 S.W.3d 353 (Tex. Crim. App. 2008). "The United States Supreme Court has determined these fundamental constitutional rights include the right to counsel, the right to an impartial judge, the right to not have members of the defendant's race unlawfully excluded from a grand jury, the right to self-

representation at trial, and the right to a public trial." *Williams*, 194 S.W.3d at 579, citing *Fulminante*, 499 U.S. at 309-310.

Additionally, "the U.S. Supreme Court has explained, and [the Court of Criminal Appeals] has reiterated that '[the] principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" *Rogers v. State*, 664 S.W.3d 843, 849 (Tex. Crim. App. 2022). "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." *Kimble v. State*, 537 S.W.2d 254, 255 (Tex. Crim. App. 1976).

Based on the foregoing, a trial court's acts and behavior constituting fundamental constitutional due process error may be reviewed in the absence of a proper objection as the right to a fair trial and impartial judge are at least category-two *Marin* rights. "Regarding these rights, 'the judge has an independent duty to implement them absent an effective waiver . . . . As a consequence, failure of the judge to implement them at trial is an error which might be urged on appeal whether or not it was first urged in the trial court." *Garcia*, 149 S.W.3d at 144.

ii. Appellant's Rights to Fair Trial and Impartial Judge were Violated

When Judge Clark began asking Detective Brady questions, it started as what seemed to be an allowable clarifying line of questioning. (5R.R. 61). However, it quickly became an interaction in which Judge Clark took over the State's advocacy role and

tried to lead the witness into different answers he clearly hoped would help the State to establish exigent circumstances. (5R.R. 61-64).

Prior to the court's interjection, all the State had elicited as to why Brady and his team did not obtain a second warrant was that they felt the apartment had been abandoned. (5R.R. 62). Judge Clark appeared intent on eliciting, contrary to what Brady had previously testified, that Brady felt he and his team felt an inescapable urgency to search the apartment without a warrant because the family would be removing items a couple days later. When Brady mentioned that they went back to the apartment due to information about some evidence they missed, the court asked further if he "had some information . . . that the family wanted to go into the apartment and remove the contents, right?" (5R.R. 61). Brady answered in the affirmative, and the court asked, "Did that set off any alarms in your brain?" (5R.R. 62). Brady answered, "No." (5R.R. 62).

Despite Brady denying that the information from the family about removing items from the apartment was the reason they returned without a warrant, and confirming that they could have gotten a warrant, the court began coaxing different answers with leading questions: "Was there some concern that if you didn't that that whatever information that you had about evidence being in that apartment might be removed by the family? Was that of some concern to you?" (5R.R. 62). Judge Clark also reminded Brady of his previous testimony at the trial that the expired warrant had taken a couple of days to be signed, and followed up with, "Was that thought in your mind

that that could very well happen again and that possibly you'd lose the opportunity to obtain some evidence because the family removed it, was that of some concern?" (5R.R. 63). "Is that one reason why you didn't go back and get a search warrant?" (5R.R. 63). Judge Clark concluded this inquiry by stating:

> So I guess what you're saying is – I don't want to put words in your mouth, I'll just ask you – are you saying that because of the additional information that you obtained in your investigation about property being in that apartment and your knowledge that the family was wanting to get in there to remove the contents of the apartment and the difficulty that you had in obtaining a warrant the first time and your feeling that the apartment had been abandoned, that the apartment project manager had control of the property, that's the reason you didn't get a search warrant; is that correct or incorrect?"

(5R.R. 63-64).

This line of questioning was designed to assist the State in its attempt to establish that there were exigent circumstances and consent justifying Brady's warrantless search. This far surpassed a judge's discretion to ask clarifying questions—Judge Clark led Brady into changing his answers to the question of why he returned to the apartment without a warrant and used these extracted answers to justify his ruling denying the motion to suppress. He took this improper advocacy even farther when he began assisting the State in cross-examining Appellant on whether he lived at the apartment, even using the adversarial inquiry to call Appellant a liar. "A judge must not . . . have an actual bias against the defendant . . . or . . . assume the role of a prosecutor." *Esparza v. State*, No. 13-21-00349-CR, 2022 WL 5237907 at *3 (Tex. App.—Corpus Christi-

Edinburg, Oct. 6, 2022, no pet.) (mem. op. not designated for publication), citing *Avilez v. State*, 333 S.W.3d 661, 673 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

The conclusion that Judge Clark abdicated his role as an impartial and neutral arbiter and adopted one of outright advocacy for the State is inescapable. While a court may ask clarifying questions of a witness, there was nothing to clarify: Detective Brady was clear that the reason they did not obtain a second warrant was because they did not want to, because they believed the apartment was abandoned, and they believed they had consent from people who did not live there. He was also clear that the family indicating it wanted to clean out the apartment on the 19th did *not* set off any "alarm bells" for him. Judge Clark was dissatisfied with these answers because they did not show exigent circumstances, so he designed a goading line of questioning to get Brady to change his answers to justify the ruling he wanted to make. He then also resumed cross-examination of Appellant on behalf of the State. In doing so, he became an advocate for the State.

The *Proenza* line of cases regarded an improper judicial comment issue under TEX. CODE CRIM. PROC. § 38.05 rather than the wholesale deprivation of an impartial judge on constitutional grounds, but their analyses are related and helpful here. In *Proenza*, both the Court of Criminal Appeals and the Court of Appeals (Corpus Christi-Edinburg) explained that an exchange between the trial judge and a witness exceeded the trial court's allowable intervention when it engaged in a line of questioning meant to sow disbelief in the defendant's position and affect credibility. *Proenza v. State*, 555

S.W.3d 389, 397 (Tex. App.—Corpus Christi-Edinburg, 2018, no pet.), *on remand from and citing Proenza v. State*, 541 S.W.3d 786, 790 (Tex. Crim. App. 2017). That line of questioning found improper by both courts was far milder than the lines of questioning here. And the *Proenza* inquiry in question did not, as it did here, seek to change an officer witness's testimony to affect the outcome of an evidentiary ruling in favor of the State. *Id.* at 395-97.

Judge Clark revealed his bias against Appellant and abandoned his role as an impartial arbiter by taking the State's baton and running across the suppression finish line with it. This violated Appellant's right to an impartial judge and due process. U.S. CONST. amends. V, VI, XIV; TEX. CONST. art. 1, § 10; *see United States v. Filani*, 74 F.3d 378, 385 (2d Cir. 1996) (a trial court "should exercise self-restraint and preserve an atmosphere of impartiality and detachment" and "exceeds its duty when it becomes an advocate and asks improper questions") (internal quotation marks and citations omitted); *United States v. Hickman*, 592 F.2d 931, 936 (6th Cir. 1979) (holding defendant was deprived of a fair trial and impartial judge when the judge acted as a "surrogate prosecutor").

C. Harm

Because Appellant was deprived of his due process right to a fair and impartial judge, the error in this case is structural. *See Jordan v. State*, 256 S.W.3d 286, 290 (Tex. Crim. App. 2008) (A 'structural error' "affect[s] the framework within the trial proceeds, rather than simply an error in the trial process itself" and render[s] a trial fundamentally

unfair."). The short list of errors that are structural and require automatic reversal includes the lack of an impartial judge. *Fulminante*, 499 U.S. at 308-310, citing *Tumey*, 273 U.S. 510. As a result, the error in this case is not subject to a harm analysis. *Id.*

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

Judge Clark did not conduct this witness inquiry with the "manifest intent to benefit the defendant and to protect [the defendant's] rights[.]" *Unkart*, 400 S.W.3d at 101. The State argued exigent circumstances justified a search but failed to elicit testimony supporting that contention; the trial court took over to attempt to establish the needed circumstances, and in doing so very literally acted as an advocate for the State. As a result, Judge Clark's usurping of the State's role in questioning its officer witness and his advocacy for the State's position were not harmless beyond a reasonable doubt. It was done for the purpose of justifying the denial of defense counsel's motion

to suppress, which concerned very important evidence that was heavily contested. Judge Clark's inappropriate inquiry on behalf of the State and abandonment of his neutral role calls into question every one of his rulings in this case, of which there were many. Therefore, this Court should reverse and remand for a new trial.

Issue II: The trial court failed to properly instruct the jury by instructing that it was permitted rather than required to acquit in the self-defense paragraphs of the jury charge. It used the word "should" rather than "must" which amounts to a misstatement of law that rises to the level of structural error.

A. Applicable Law and Standard of Review

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

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

error when the erroneous instruction "authoriz[es] any diminution of the State's burden of proof." *Robinson v. State*, 596 S.W.2d 130, 132 (Tex. Crim. App. 1980) (en banc).

However, if an error rises to the level of structural, a reviewing court need not conduct a harm analysis.

B. Analysis

i. Step One: Jury Charge Error

The jury charge in this case was erroneous because it instructed the jury it "should" acquit in the application paragraphs rather than "must." It instructed as follows:

> Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, Ricky Sharrod Brown, did shoot Derick Randle with a firearm, as alleged, but you further find from the evidence, as viewed from the standpoint of the defendant at the time, that from the words or conduct, or both of Derick Randle it reasonably appeared to the defendant that his life or person was in danger and there was created m his mind a reasonable expectation or fear of death or serious bodily injury from the use of unlawful deadly force at the hands of Derick Randle, and that acting under such apprehension and reasonably believing that the use of deadly force on his part was immediately necessary to protect himself against Derick Randle's use or attempted use of unlawful deadly force, he shot Derick Randle, then you **should acquit the defendant on the grounds of self-defense**, or if you have a reasonable doubt as to whether or not the defendant was acting in self-defense on said occasion and under the circumstances, then you **should give the defendant the benefit of that doubt** and say by your verdict, not guilty[.]

(C.R. 524-25) (emphasis added). The "should" language reads only to apply in the event the jury believes self-defense or has a reasonable doubt regarding self-defense, making it permissive.

Texas law provides that "[i]f the issue of the existence of a defense is submitted to the jury, the court **shall** charge that a reasonable doubt on the issue **requires** that the defendant be acquitted." TEX. PENAL CODE § 2.03. The statutory language is unequivocal; a jury must be instructed that they **must** acquit if they find self-defense from the evidence or if the State has not proven beyond a reasonable doubt that the actor was not acting in self-defense. *See Ryser v. State*, 453 S.W.3d 17, 32 (Tex. App. – Houston [1st Dist.] 2014, pet. ref'd) ("[T]he trial court was required to include in the charge an instruction that the jury must acquit [appellant] if it has a reasonable doubt concerning his justification defense.").

The permissive "should" language here undercuts the presumption of innocence and undermines the State's burden to disprove self-defense beyond a reasonable doubt. *Russell v. State*, 834 S.W.2d 79, 82 (Tex. App.—Dallas 1992, pet. ref'd) ("If the defendant shows entitlement to a jury instruction on self-defense, '[t]he jury must be instructed *to acquit* the defendant if they believe that he was acting in self-defense or have a reasonable doubt thereof.'") (emphasis added). The Fourteenth Court of Appeals has recognized jury charge error when the instruction contained mandatory rather than permissive language. *Webber*, 29 S.W.3d at 231. In *Webber*, the Court concluded transforming a permissive presumption into a mandatory presumption was error. *Id.*

Some jurisdictions have rejected the argument that the use of "should acquit" rather than "must acquit" is error. For example, the Seventh Circuit of the federal courts of appeals has held that the use of "should acquit" is not plain error. *United States v. Ray*,

238 F.3d 828, 835 (7th Cir. 2001), quoting *United States v. Kerley*, 838 F.2d 932, 940 (7th Cir.1988). In that case, the court explained "must" is merely "preferable" to "should," but that juries simply know that they are required to acquit if they have a reasonable doubt and are not misguided by permissive-versus-mandatory language because they "know better than that." *Id.* A Georgia state court has likewise rejected the argument, reasoning that "the words 'should acquit' are the language of command." *Parks v. State*, 695 S.E.2d 704, 708 (Ga. App. 2010) (citations omitted).

Contrarily, the State of Washington has not only recognized that "should acquit" rather than "must acquit" is error, but also that it is structural: "Erroneously instructing the jury that it may acquit if in reasonable doubt is structural error." *State v. Smith*, 298 P.3d 785, 790–91 (2013), citing *United States v. Gonzalez–Lopez,* 548 U.S. 140, 149 (2006) (denial of the right to trial by jury by giving of a defective reasonable doubt instruction is structural error). "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty . . . . [T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. [We have] held that an instruction of the sort given here does not produce such a verdict. Petitioner's Sixth Amendment right to jury trial was therefore denied." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

The decisions rejecting this issue are misguided. The Seventh Circuit even recognized the difference between the two words and, yet, determined that juries simply "know better." *Ray*, 238 F.3d at 835 (stating the word "must" is "preferable"). But this

is entirely speculative—especially so given that courts presume juries follow the instructions as given. *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998).

The Georgia court's reasoning that "should" is equivalent to "must" ignores the inherent ambiguity in the word "should" and contradicts general and legal understandings of its meaning. Varying definitions explain the word *can* have a commanding undertone but that it also denotes a suggestion, preference, or morally correct course of action. *See Should*, MERRIAM-WEBSTER DICTIONARY ("should", though sometimes read as the past-tense of "shall," when used in its auxiliary form expresses "obligation, propriety, *or* expediency") (emphasis added)[4]; *Should*, CAMBRIDGE DICTIONARY (one mainstream use of "should" is to express "what is the correct or best thing to do" which is not the same thing as a requirement)[5]; *see also* Marjolein Grefsema, *Can, May, Must and Should: A Relevance Theoretic Account*, 31 J. LINGUISTICS 53, 53 (1995) (the word "should" has multiple meanings, some of them being non-obligatory).

Popular website Urban Dictionary provides laypeople's usages and meanings of words and phrases.[6] Urban Dictionary has several definitions of the word "should": "When you say someone has the ability to do something, and it would be advantageous to do so; they should"; "A word used to describe something that could happen but

[4] Available at https://www.merriam-webster.com/dictionary/should.
[5] Available at https://dictionary.cambridge.org/us/dictionary/english/should.
[6] https://www.urbandictionary.com/.

likely will never due to a standard lack of caring, ethics, or general sense"; and "Like could, only replace the c with a sh." *Should*, URBAN DICTIONARY.[7]

Urban Dictionary "was founded in 1999 by computer science student Aaron Peckham to make fun of the comparatively staid Dictionary.com. Yet Urban Dictionary has become much more than a parody site, drawing approximately 65 million visitors every month." Christine Ro, *How Linguists are Using Urban Dictionary*, JSTOR DAILY (Nov. 13, 2019).[8] While the use of an online slang dictionary to consider the ramifications of one word in a jury charge may seem silly, Ro notes it would not be the first time a court has done so:

> Urban Dictionary is being used to determine the acceptability of vanity plate names in some [] states. More serious is the continued tradition of dictionary use in legal cases, where the interpretation of a single word can have grave consequences. Urban Dictionary's definition of *to nut*, for instance, has been brought up in a sexual harassment claim, and the meanings of *jack* were debated in a financial restitution case.

Id. (noting that although "some lexicologists believe that depending on a crowdsourced dictionary is risky," use of Urban Dictionary definitions "may be useful in a legal setting"). Though certainly not dispositive, considering the content of "public dictionary websites" is valuable in understanding how regular people are actually using words in the English language. *Id.* (explaining linguists regularly cite Urban Dictionary in research).

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[7] https://www.urbandictionary.com/define.php?term=Should.

[8] Available at https://daily.jstor.org/how-linguists-are-using-urban-dictionary/. Ro goes on to explain that this repository of crowdsourced definitions—now archived by the Library of Congress—is reminiscent of English slang dictionaries used "in some form for centuries." *Id.*

Due to the inherent ambiguity and multi-meaning of the word "should", legal minds toil over its use in lieu of the unambiguous "must" or "shall." California even defines the difference in its code:

> (a) "Shall" means action which is necessary to achieve compliance and no alternative courses of action are acceptable to achieve compliance.
> (b) "Should" means action which is preferable to achieve compliance, while recognizing that there are circumstances where alternative courses of action are open to users.

CAL. CODE. REGS. TIT. 2, § 13 ("Definitions – Shall, Should, May, and Best Practices").

Consider the Federal Rules of Civil Procedure: for seventy years, they required summary judgment under certain circumstances and used the word "shall" regarding the action the trial court must take in those circumstances. Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1139-40 (2010). In 2007, the Advisory Committee changed "shall" to "should" in an attempt to modernize the language. *Id.* Soon after this change, it was determined "should" was a mistranslation of "shall" because that word implies a limited discretion to act otherwise, but summary judgment is an entitlement when the conditions are met. Therefore, the text was changed again: the Advisory Committee selected "must" because that word is a correct translation of "shall" in modern English. *Id.* at 1140-41.

This Court is asked to recognize instructing a jury it "should" acquit rather than using mandatory language is jury charge error. "If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue

requires that the defendant be acquitted." Tex. Penal Code Ann. § 2.03. Using "should" renders the jury instruction a misstatement of law.

ii. Step Two: Harm

This jury charge error rises to level of structural error. *Sullivan*, 508 U.S. at 278; *Smith*, 298 P.3d at 790–91. It therefore does not require a harm analysis. *Jordan v. State*, 256 S.W.3d 286, 290 (Tex. Crim. App. 2008), citing *Arizona v. Fulminante*, 499 U.S. 279, 294-95 (1991). An error may be structural "where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt." *McCoy v. United States*, 584 U.S. 414, 427 (2018), citing *Weaver v. Massachusetts*, 582 U.S. 286 (2017). The *Sullivan* court found structural error where a jury charge contained a "misdescription" of the "beyond a reasonable doubt" burden. *Sullivan*, 508 U.S. at 277, 281-82. The charge error in Appellant's case is analogous to that of *Sullivan*.

Issue III: The trial court erred in denying Appellant's motion to suppress evidence derived from the warrantless search of his apartment he shared with the complainant in violation of the Fourth Amendment to the United States Constitution and Article 1, § 9 of the Texas Constitution.

The court conducted a hearing on defense counsel's mid-trial motion to suppress regarding a search of Appellant's apartment outside the presence of the jury. (5R.R. 10-104). The State's position on the validity of the search was that Appellant did not have standing; valid consent to the search was given by people who did not live or stay in the

apartment; and that there were exigent circumstances justifying the search. (5R.R. 85-86).

Detectives conducted two searches: the first was with a warrant on June 13th. (5R.R. 55-56). The warrant's last valid day was on the 16th; on that day, they were informed the family wanted to move things out of the apartment on the 19th. (5R.R. 59-60). Brady testified they did not get another warrant because they believed the apartment was abandoned and because family and the apartment manager apparently gave "consent." (5R.R. 56). With that second search, they found possible blood stains and a bottle of bleach in the apartment during the second search. (4R.R. 245-48).

Judge Clark, apparently deciding the State had not done enough to show exigent circumstances, began questioning Brady about why he and his team conducted the second search without even attempting to obtain a second warrant. (5R.R. 61-64). Detective Brady contended that on the 17th, he and his partner received information that led them to believe there was evidence in the complainant's and Appellant's apartment they somehow missed the first time around. (5R.R. 61-62). They found out on the 16th that the complainant's family was going to the unit to remove his things. (5R.R. 61-62). The trial court elicited from Brady that he could have gone back to get another warrant but did not. (5R.R. 62). When prodded by the court, Brady said there was some concern about timing because the family was coming to remove items and because there was some delay in getting the first warrant signed. (5R.R. 62-64).

A. Applicable Law and Standard of Review

The United States and Texas constitutions prohibit unreasonable searches and seizures. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9. This requires police to obtain a warrant supported by probable cause before conducting a search or seizure. *Riley v. California*, 573 U.S. 373, 382 (2014). The right to be free from warrantless searches may be invoked by one who has a "reasonable expectation of privacy" in the thing searched. *Villarreal v. State*, 935 S.W.2d 134, 137 (Tex. Crim. App. 1996) (en banc), citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). This is referred to as "standing" to challenge a search or seizure. It is the burden of the person invoking their right against unreasonable searches and seizures to show they had both a subjective and objective reasonable expectation of privacy. *State v. Betts*, 397 S.W.3d 198, 203-04 (Tex. Crim. App. 2013).

A person who lives in an apartment has a reasonable expectation of privacy in that apartment, and when "society is prepared to recognize [that expectation] as reasonable under the circumstances." *Howard v. State*, 570 S.W.3d 305, 309 (Tex. App.—Houston [1st Dist.] 2018, no pet.). "[O]wnership or legal possession of the property searched is not the 'be-all-end-all' in deciding whether a person has a legitimate expectation of privacy in the property." *Williams v. State*, 502 S.W.3d 254, 259 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). Even overnight guests have a reasonable expectation of privacy in the place where they are staying. *Minnesota v. Olson*, 495 U.S. 91, 91 (1990). The issue of "standing" is reviewed de novo, while findings of historical fact are reviewed for abuse of discretion. *Williams*, 502 S.W.3d at 259.

"A warrantless search is per se unreasonable under the Fourth Amendment unless it falls within a recognized exception to the warrant requirement." *State v. Garcia*, 569 S.W.3d 142, 148 (Tex. Crim. App. 2018). When there is no warrant, it is the state's burden to establish an exception applied. *Id.* One exception to the warrant requirement is when someone who "possesses common authority over [the] premises" consents to the search. *United States v. Matlock*, 415 U.S. 164, 170 (1974). Another warrant exception is if probable cause exists and there are exigent circumstances justifying the warrantless intrusion. *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). Exigent circumstances exist, for example, when police reasonably believe someone needs urgent aid; to protect police "from persons whom they reasonably believe to be present, armed, and dangerous"; and when the intrusion is to prevent the imminent destruction of evidence. *Id.*, *Birchfield v. North Dakota Dep't of Transp.*, 579 U.S. 438, 456 (2016).

Evidence procured in violation of the Fourth Amendment is barred from admission in criminal proceedings. *Elkins v. United States*, 364 U.S. 206, 223 (1960); TEX. CODE CRIM. PROC. art. 38.23 ("No evidence obtained by an officer . . . in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence . . . .").

A court's findings of historical fact—and applications of law to those facts that require a determination of credibility of a witness—are reviewed for abuse of discretion. *State v. Martinez*, 570 S.W.3d 278, 281 (Tex. Crim. App. 2019). Mixed questions of law and fact where a witness's credibility and demeanor are irrelevant, and purely legal

questions, are reviewed de novo. *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011).

B. Analysis

i. Preservation

Defense counsel timely objected to the admission of evidence related to this warrantless search, a hearing was had outside the presence of the jury, a ruling was made, and counsel obtained a running objection. (4R.R. 251-60; 5R.R. 8-106); TEX. R. APP. P. 33.1; TEX. R. EVID. 103; *Lopez v. State*, 253 S.W.3d 680, 684 (Tex. Crim. App. 2008). The motion to suppress pertained to evidence found during the warrantless search and any evidence derived from those items as "fruit of the poisonous tree" including:

- Photographs of the apartment, blood stains, the bleach bottle, & accompanying testimony (5R.R. 114-22, 153; 9R.R. St. Exs. 49-68);
- The testimony of the crime scene investigator, Roberto Gonzalez, regarding anything on the inside of the apartment and any evidence related to his actions during the search including the BLUESTAR testing (5R.R. 153-62; 9R.R. St. Ex. 79)
- The swabs themselves taken from the scene and the bleach bottle itself (5R.R. 124, 156-62; 9R.R. St. Exs. 80-85)

- The comparison of DNA to the blood evidence and bleach bottle found in the second search, including the testimony of Rochelle Austen, her reports, and the testimony of Mary Georges and her reports to the extent they were derived from evidence found in the apartment (5R.R. 124, 200-16, 220-32, 237-38, 241, 247-48; 9R.R. St. Exs. 87-91, 127, 128, 116-119).
- Any other testimony related to warrantless search and any other evidence derived from the warrantless search.

The State may argue defense counsel forfeited the suppression issues because after the motion was denied mid-trial, counsel stated, "No objection" when the State subsequently offered the fruits of the search into evidence. *E.g.*, (5R.R. 114-160, 203-09). However, stating, "No objection" does not forfeit the previous objection when the record is unambiguous that counsel meant to preserve it. *Moore v. State*, NO. PD-0239-23, 2023 WL 4758682 at *1-2 (Tex. Crim. App. Jul. 26, 2023) (per curiam) (mem. op. not designated for publication), citing *Thomas v. State*, 408 S.W.3d 877, 885 (Tex. Crim. App. 2013) ("If the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his 'no objection' statement to constitute an abandonment of a claim of error that he had earlier preserved for appeal, then the appellate court should not regard the claim as 'waived'. . . ."). Counsel went to great lengths to preserve the suppression issue by initiating and arguing an extensive hearing outside the presence of the jury and then by obtaining a running objection. (4R.R. 251-

60; 5R.R. 8-106). Therefore, the record as a whole is unambiguous that he intended to preserve the suppression issue as to the fruits of the warrantless search. *Moore*, 2023 WL at *1-2.

ii. Appellant had a reasonable expectation of privacy in his and the complainant's apartment.

There are several factors a reviewing court assesses when determining whether a person had a reasonable expectation of privacy in the place searched:

> (1) whether the accused had a property or possessory interest in the place invaded; (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy.

Betts, 397 S.W.3d at 203–04. This question is assessed for the totality of the circumstances. *E.g.*, *Matthews v. State*, 431 S.W.3d 596, 606-07 (Tex. Crim. App. 2014) (recognizing someone has a reasonable expectation of privacy in a borrowed car). "[T]he premise that property interests control the right of the Government to search and seize has been discredited." *Katz v. United States*, 389 U.S. 347, 353 (1967), citing *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967).

Appellant and the complainant were a long-term couple. (5R.R. 20, 255). The apartment was leased under the complainant's name but Appellant lived in it with him since day one according to multiple witnesses. (5R.R. 13, 20, 26-29, 35-36, 66). The apartment manager was one of those witnesses—she knew Appellant lived there with

him, and Appellant knew she knew. (5R.R. 27-29). At one point she went to knock on the door and Appellant answered, and she did not say anything to indicate he was not allowed there. *Id.* He continued to live there after the complainant's death. (5R.R. 68). He only did not return when the manager changed the locks in July—well after the police searched the apartment. (5R.R. 68-69). That address was the address on his license, he exercised control over the apartment and excluded others' access, and he received mail there. (5R.R. 68-69).

In ruling that Appellant did not have standing to challenge the search, the trial court stated it was unclear whether he lived in that apartment. (5R.R. 103). This is a head-scratcher conclusion given that everyone who testified about his living situation testified he lived in that apartment with the complainant. (5R.R. 10, 20, 23-24) (the complainant's cousin testifying Appellant lived with complainant in the apartment); (5R.R. 27-29, 35-38) (the apartment manager testifying she knew Appellant stayed at the complainant's apartment almost every night and was living there); (5R.R. 66-69) (Appellant testifying he lived with the complainant in the apartment and though he was not on the lease, he helped pay the bills). Appellant had a reasonable expectation of privacy in that apartment at the time the searches occurred because he lived there and continued living there until the manager changed the locks after the searches occurred. (5R.R. 68-74); *Katz*, 389 U.S. at 352-53; *see also Olson*, 495 U.S. at 96-97 (holding that even an overnight guest has a reasonable expectation of privacy in a host's place).

iii. Tina Fuentes and the complainant's family members could not consent to the search of the apartment.

A warrantless entry may also be lawful when voluntary consent has been obtained from a third party who possessed common authority over the searched premises. *Illinois v. Rodriguez,* 497 U.S. 177, 181 (1990); *Limon v. State*, 340 S.W.3d 753, 756 (Tex. Crim. App. 2011). The concept of common authority rests "on mutual use of the property by persons generally having joint access or control for most purposes" and is derived from the third party's use of the property rather than his legal property interest. *Limon*, 340 S.W.3d at 756 (quoting *United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1974)).

Furthermore, valid consent may also be obtained from an individual with "apparent" authority over the premises. *Id.*, citing *Rodriguez,* 497 U.S. at 188. To determine apparent authority using an objective standard, a reviewing court should ask: "would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" *Id.*, quoting *Rodriguez,* 497 U.S. at 188. The reasonableness of an officer's belief in a person's authority to consent hinges on "widely shared social expectations" and "commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interest." *Id.* at 756-57, citing *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). However, "[o]fficers may not take a third party's claim of common authority at face value when the circumstances are ambiguous or if the claimed authority appears to be

unreasonable, and in such cases the officers may not proceed without making a further inquiry." *Miller v. State*, 208 S.W.3d 554, 560 (Tex. App.—Austin 2006, pet. ref'd) (citation omitted). The State must prove either actual or apparent authority by a preponderance of the evidence. *Id.*

Tina Fuentes, the manager of the apartment complex in which Appellant and the complainant lived, was aware Appellant lived there. (5R.R. 26-30). She agreed non-lessee tenants have rights, but did not know the specifics of notice-to-vacate requirements as to those types of residents. (5R.R. 35-36). She had given a notice to vacate to the complainant prior to his death, but eviction proceedings were not initiated. (5R.R. 29-30). Given Fuentes knew Appellant was not just an overnight guest but that he actually lived in that apartment with the complainant, and she had not evicted Appellant before changing the locks, she did not have the authority to consent to a search. (5R.R. 26-54). The State did not prove the detectives' belief that she had authority was reasonable. She was obviously not a co-habitant. The State also did not prove that the complainant's family had authority to consent to the search. (5R.R. 10-24). They had no rights to the apartment and the record does not show they lived there, or that they had or appeared to have authority to consent to the search. *Id.*

Because the State did not prove that Tina Fuentes (the apartment manager) or the complainant's family members had the authority to consent to the search, the consent exception does not apply. *Limon*, 340 S.W.3d at 756-57.

iv. There were no exigent circumstances justifying the warrantless search of the apartment.

The existence of exigent circumstances is decided on a case-by-case basis. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013). Examples of exigent circumstances which will excuse a warrant are entering a home to render emergency assistance to an injured occupant or to protect an occupant from imminent injury, *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); a fire exception, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); hot pursuit, *United States v. Santana*, 427 U.S. 38, 42 (1976); and the potential for the imminent destruction of contraband. *Kerr v. California*, 374 U.S. 23, 40 (1963).

All the State elicited at the hearing on the motion to suppress was that the detectives did not bother even trying to get a second warrant after the first one expired because they assumed, for whatever reason (even though Appellant's things were still there), that it was "abandoned." (5R.R. 56, 62). The trial court, unhappy with this explanation, then elicited from Detective Brady that Brady's team had "some concern" about timing since the family was to come in and remove things around two days after they found out the information that inspired them to go back for the second search. (5R.R. 62). Brady also agreed they had had some "difficulty" in getting the first warrant in that it was "delayed." (5R.R. 62-63). They did not even go back into the apartment for the second search until the day after they found out there might be evidence inside that they somehow missed the first time. (5R.R. 60-62). Brady stated they did not ask

the family to delay their moving of the items "because we had already – no, we didn't because we didn't need to." (5R.R. 64-65).

Despite that Brady somewhat changed his answers at the behest of the trial court, his new answers still did not provide articulable facts showing exigency. No one testified that the family was going to destroy evidence or that their planned removal of things from the apartment was imminent, given the timeline by Brady which certainly did not show any imminent danger. (5R.R. 55-64). The detectives did not even attempt to get a second warrant even though there were two days until the family had stated they were planning on moving things out. (5R.R. 56-65). Brady found out on the 16th the family was coming on the 19th; he found out on the 17th that there might have been evidence they missed the first time around, and leisurely went back to the apartment on the 18th. *Id.* This destroys any notion that removal of evidence was "imminent."

Detectives also did not think to simply ask the family if they could hold off on removing items from the unit—since the family indicated they were fine with the officers conducting the search (though they did not have actual or apparent authority to provide consent), there was no indication they would have refused to delay their removal of items if officers had to wait for a warrant. There were no exigent circumstances to justify the warrantless search. *See Davila v. State*, 441 S.W.3d 751, 758 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd), citing *Turrubiate v. State*, 399 S.W.3d 147 (Tex. Crim. App. 2013) (clarified by *Igboji v. State*, 666 S.W.3d 607 (Tex. Crim. App. 2023) on the issue of "furtive movement").

C. Harm

Constitutional errors are subject to a harm analysis under TEX. R. APP. P. 44.2(a). "[T]he harm analysis for the erroneous admission of evidence obtained in violation of the Fourth Amendment must be Rule 44.2(a)'s constitutional standard." *Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001) (reversing the judgment of the Court of Appeals for applying a non-constitutional harm analysis). A judgment must be reversed unless this Court determines "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." *Holmes v. State*, 323 S.W.3d 163, 173-74 (Tex. Crim. App. 2009). "The State has the burden, as the beneficiary of the error, to prove that the error is harmless beyond a reasonable doubt." *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020), citing *Deck v. Missouri*, 544 U.S. 622, 635 (2005).

The second search of the apartment gave rise to a string of prejudicial evidence. Detectives found what turned out to be blood stains on a door frame and on a bottle of bleach. (5R.R. 114-121). DNA analyses were performed on these items and the complainant was found to be a probable contributor to the blood evidence. (5R.R. 124, 200-16, 220-32, 237-38, 241, 247-48; 9R.R. St. Exs. 81, 83, 87-91, 127, 128, 116-119). This was in conjunction with evidence (which is the subject of another issue on appeal—*see infra*, Issue IV) that a witness claimed he helped Appellant dispose of the complainant's body and clean up the scene. *E.g.*, (5R.R. 116, 121, 158-59). This evidence

was damaging, and this Court cannot determine it was harmless beyond a reasonable doubt.

Issue IV: If this Court finds defense counsel failed to preserve the motion to suppress, then defense counsel rendered ineffective assistance of counsel in doing so, depriving Appellant of his right to effective assistance of counsel.

This issue is made in the alternative to Issue III. If this Court determines the suppression issue briefed *supra*, pp. 29-42 (Issue III) was not properly preserved, then defense counsel rendered ineffective assistance of counsel in failing to preserve it.

A. **Applicable Law and Standard of Review**

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

To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The first prong of Strickland requires the defendant to prove

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

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

Generally, "a direct appeal proves an inadequate vehicle for raising an ineffective assistance claim" because often, the cold record is not developed to "reflect the motives behind trial counsel's actions." *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999). A court will not find deficient performance unless the challenged conduct is "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

However, Texas Courts of Appeals have found both *Strickland* prongs from only the cold record in some cases. *E.g.*, *Andrews v. State*, 159 S.W.3d 98, 102-03 (Tex. Crim. App. 2005) (finding deficient performance on direct appeal when counsel failed to object to the State's detrimental misstatement of the law despite not being able to ascertain counsel's subjective motivation for failing to do so because there was no conceivable reason for the failure to object); *Morrison v. State*, 575 S.W.3d 1, 26 (Tex. App. – Texarkana 2019, no pet.) (holding defense counsel was ineffective for disclosing confidential communications).

i. Performance Prong

Defense counsel will have rendered constitutionally deficient performance if this Court determines he failed to preserve the suppression issue briefed in Issue III. Error must be preserved to be reviewed on appeal. *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). To preserve error, the complaint must be "made to the trial court by a timely request, objection, or motion." TEX. R. APP. P. 33.1. One must keep objecting

each time the complained-of evidence is offered unless counsel obtains a running objection or a ruling on the issue is made in a hearing outside the presence of the jury. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991); *Martinez*, 98 S.W.3d at 193; TEX. R. EVID. 103(b). However, "[i]f a defendant fails to object until after an objectionable question has been asked and answered, and he can show no legitimate reason to justify the delay, his objection is untimely, and any claim of error is forfeited." *Luna v. State*, 268 S.W.3d 594, 604 (Tex. Crim. App. 2008).

The record here shows defense counsel would have had no strategic reason—let alone a reasonable one—for failing to adequately object to the fruits of the warrantless search. The record shows defense counsel vehemently objected to the admission of any evidence having to do with the warrantless search. (4R.R. 251-60; 5R.R. 8-106). He participated in a lengthy mid-trial hearing on his motion to suppress, the record of which spans multiple volumes. (4R.R. 251-60; 5R.R. 8-106). After the suppression was denied, he then obtained a running objection to the admission of any evidence derived from that unconstitutional search. (5R.R. 106). This shows any forfeiture of the issue would not have been not a strategic decision—it would be objectively unreasonable and would fall below the constitutional bar. *See Vasquez v. State*, 830 S.W.2d 948, 950-51 (Tex. Crim. App. 1992) (en banc) (per curiam) (holding it was "clearly deficient" from the cold record for defense counsel to have failed to request a necessity instruction), cited by *Thompson v. State*, 9 S.W.3d 808, 816 (Tex. Crim. App. 1999) (Meyers, J., dissenting) (opining that circumstances, including defense counsel's other choices in

objecting to the same evidence, can "overcome the *Strickland* presumption that counsel's omission was the result of a calculated decision based on a reasonable trial strategy").

ii. Prejudice Prong

To show prejudice for failure to object/preserve issues for appeal, one must show that the result of the proceeding would have been different. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). The merits of this suppression issue are fully briefed in Issue III, *supra* pp. 29-33, 35-42. Those facts and analysis are incorporated here by reference. Because it was error to overrule an objection to the evidence derived from the warrantless search, there is prejudice here under *Strickland. Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009), citing *Strickland*, 466 U.S. at 694. Additionally, the evidence itself from the warrantless search of the apartment was harmful—it corroborated Brady's other testimony (the subject of yet another claim on appeal) that a deceased witness said the complainant's body was brought into the apartment and then disposed of. *E.g.*, (5R.R. 116, 121).

If this Court determines the suppression issue briefed in Issue III was not, in fact, preserved, then defense counsel was constitutionally ineffective; this Court should reverse and remand for a new trial.

Issue V: Defense counsel rendered ineffective assistance of counsel in failing to preserve a Confrontation Clause objection to the admission of absent witness Paul Hopkins's statements.

Counsel failed to timely and consistently object to absent witness Paul Hopkins's alleged statements under the Confrontation Clause and therefore failed to preserve the issue for appellate review.

The State offered into evidence prejudicial statements from a non-testifying witness named Paul Hopkins at several points at trial: Detective Brady testified his team learned from Hopkins that the complainant's body was taken into the apartment that was searched. (4R.R. 244). Defense counsel objected on confrontation clause grounds, and the objection was sustained. (4R.R. 244-45). Counsel did not move to strike the statement about the information that the body was taken there. Prior to this interaction, defense counsel objected to the State eliciting information why Hopkins would not be testifying. (4R.R. 111-13). Defense counsel and the State then argued why the State should be able to get into whether Hopkins would have been charged in connection to this shooting; the State mentioned this fact (why Hopkins should or should not have been charged) would come in through the detective. (4R.R. 113-14). Defense counsel stated this would violate "the confrontation" and requested a running objection. (4R.R. 114).

However, before obtaining a running objection specifically as to information regarding whether Hopkins would have been charged, Detective Brady had already testified as to very damning information given by the witness, and without timely or

appropriate objection. When the State first began to ask about Paul Hopkins's "significance" to the investigation, defense counsel objected "on the relevance of that." (4R.R. 78). This was overruled. (4R.R. 79). The detective then claimed Hopkins said he assisted Appellant in disposing of the complainant's body, which was repeated later. (4R.R. 79; 5R.R. 61). Defense counsel did not object to this. The detective testified that the information from Hopkins led detectives to return to the apartment for the second search (after they had previously searched the same apartment with a warrant and somehow did not find anything of interest). (4R.R. 78-80).

The State continued to elicit and highlight these alleged statements from Hopkins. The State asked, "Did you later through your investigation come to learn that there was something of evidentiary value there?" (4R.R. 247). Brady answered in the affirmative and stated he learned there was a bottle of bleach there. *Id.* Defense counsel did not object at this point. Later, Detective Brady testified that the laundry room in the complainant and Appellant's apartment "is where we were told the body was placed." (5R.R. 116). He then testified, "We had information that bleach was used to clean up the scene." (5R.R. 121). This information about which Brady testified all came from absent witness Paul Hopkins. (4R.R. 79; 5R.R. 61, 248-49).

A. Applicable Law and Standard of Review

The standard for a claim of ineffective assistance of counsel is briefed in Issue IV, *supra* pp. 42-44, and that standard is incorporated in full here. The standard for issue

preservation is also briefed in that issue, *supra* pp. 44-45, and that standard is incorporated here by reference as well.

B. Analysis

i. Performance Prong

The record is clear there was no strategic decision to fail to preserve the confrontation issues as to the alleged statements by absent witness Paul Hopkins. Defense counsel objected to these statements at some points—at times under confrontation grounds, and at one time on relevance grounds. (4R.R. 78, 244-45). The trial court even sustained one of the confrontation objections, later denying the same objection. (4R.R. 244-45).

However, defense counsel failed to make any objection at some mentions of Paul Hopkins's statements before obtaining a running objection, which forfeits this error on appeal. *Luna v. State*, 268 S.W.3d 594, 604 (Tex. Crim. App. 2008); *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). It is clear here that his failure to preserve the issue was a mistake and not a strategic decision. *See Brasfield v. State*, 30 S.W.3d 502, 505 (Tex. App.--Texarkana 2000, no pet.) (holding trial counsel rendered deficient performance for failing to adequately object and preserve issue); *Vasquez*, 830 S.W.2d at 950-51 (holding it was "clearly deficient" from the cold record for defense counsel to have failed to request a necessity instruction), cited by *Thompson*, 9 S.W.3d at 816 (Meyers, J., dissenting) (opining that circumstances, including defense counsel's other choices in objecting to the same evidence, can "overcome the *Strickland* presumption

that counsel's omission was the result of a calculated decision based on a reasonable trial strategy").

It was obviously not a strategic decision to forfeit the confrontation objection, and it was objectively unreasonable.

ii. Prejudice Prong

A timely and consistent objection to references to Paul Hopkins's alleged statements would have been sustained in the trial court:

Applicable Law and Analysis of Paul Hopkins's Statements – Confrontation Clause

The Confrontation Clause affords all criminal defendants the right to literally confront their accusers at trial. U.S. CONST. amend. VI; TEX. CONST. art. 1, § 10. "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); *California*, 399 U.S. at 157-58.

The right to confrontation also covers statements not made under oath. A court must determine first, though, if the challenged evidence is testimonial in nature. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). Statements gathered by a police officer "to

establish or prove past events" through structured questioning are considered impermissible ex parte testimony under the confrontation clause. *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010); *Wall*, 184 S.W.3d at 736; *Crawford*, 541 U.S. at n.4.

The State must also prove the declarant was unavailable to testify. *Crawford*, 541 U.S. at 59. Next, the State must prove the defendant was afforded "a prior opportunity to cross-examine" an unavailable declarant. *Crawford*, 541 U.S. at 55-56. "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of …." *Mattox*, 156 U.S. at 244.

Once trial counsel for a defendant makes a confrontation clause objection, the State has the burden "to establish that it was admissible under *Crawford*." *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008), *rehearing denied*. A reviewing court would apply a *de novo* review to determine whether a statement was testimonial for Confrontation Clause purposes, had the issue been properly preserved. *Wall*, 184 S.W.3d at 742.

Though it was clear Paul Hopkins was unavailable due to his death prior to trial, (4R.R. 115), there was no opportunity to cross-examine him. (4R.R. 114). His statements were testimonial because they were given to and collected by police to establish past events. (4R.R. 78-80, 244-47; 5R.R. 61, 116, 121, 248-49). "The primary

focus in determining whether a hearsay statement is testimonial is upon the objective purpose of the interview or interrogation, not upon the declarant's expectations." *De La Paz*, 273 S.W.3d at 680, *rehearing denied*. Hopkins's alleged statements to police regarding his part in allegedly assisting Appellant dispose of the complainant's body were the product of police questioning intended to prove past events for the purpose of a future trial against Appellant. (4R.R. 78-80, 244-47; 5R.R. 61, 116, 121, 248-49).

These statements fall precisely within the category sought to be excluded as impermissible ex parte testimony. *Langham*, 305 S.W.3d at 576; *Wall*, 184 S.W.3d at 736; *Crawford*, 541 U.S. at n. 4. The trial court agreed with this analysis at one point, sustaining a confrontation clause objection as to Paul Hopkins's statements during trial and inexplicably changed course in overruling counsel's objection later on. (4R.R. 244-45, 249). The issue had already been waived for lack of timely and appropriate objection, but this shows the court acknowledged the State had not proved the admission of Hopkins's statements comported with the Confrontation Clause. If defense counsel had timely objected at the earliest mention (and each subsequent mention) of the Hopkins statements on confrontation grounds, the court would have been required to sustain the objections. *Ex parte Parra*, 420 S.W.3d 821, 824-25 (Tex. Crim. App. 2013); *see also McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992) (to show prejudice, one must show the result would have been different).

Additionally, Hopkins's statements were harmful because they were the only source of the information that someone allegedly helped Appellant dispose of the body,

and were extremely prejudicial because they undercut Appellant's claim of self-defense. Because the admission of Paul Hopkins's statements violated the Confrontation Clause and should not have been admitted if properly objected to, and because those statements were harmful, there was prejudice in defense counsel's failure to timely, appropriately, and consistently object to Hopkins's alleged statements on confrontation grounds. *Strickland*, 466 U.S. at 687. This Court should reverse and remand for a new trial.

Issue VI: Defense counsel rendered ineffective assistance of counsel in failing to object to, and request a redaction of, Appellant's reference to and invocation of his right to an attorney, as well as his refusal to consent to a DNA swab.

Defense counsel failed to timely and sufficiently object to the admission and any mention of Appellant's invocation of his Fifth and Sixth Amendment rights.

When questioning Detective Brady, the State referenced Appellant's refusal to consent to a DNA swab and his invocation of his right to an attorney. (4R.R. 116-17). Defense counsel objected to these references as generally "unconstitutional." (4R.R. 117). However, the video of detectives' interrogation of the defendant had been admitted into evidence, and at the end of the video in the last few seconds, it is clearly audible that Appellant stated he would not consent to a DNA swab and invoked his right to an attorney. (9R.R. St. Ex. 122 at 1:21:34-1:21:56). He also mentioned several minutes earlier in that interrogation that he was going to hire a lawyer. *Id.* at 1:09:55-1:10:00. Defense counsel only objected to that interrogation video as a whole, and the objection was on "inadequate predicate" grounds. (4R.R. 58). However, defense

counsel did not make objections or a request for redactions regarding the particular statements at issue—*i.e.*, Appellant's invocation of his right to an attorney and refusal of a DNA swab.

A. Applicable Law and Standard of Review

The standard for a claim of ineffective assistance of counsel is briefed in Issue IV, *supra* pp. 42-44, and that standard is incorporated in full here. The standard for issue preservation is also briefed in that issue, *supra* pp. 44-45, and that standard is incorporated here by reference as well.

B. Analysis

i. Performance Prong

Defense counsel inexplicably allowed in the portion of the interrogation footage in which Appellant mentioned getting an attorney at one point and then later officially invoked his rights to an attorney and refused a DNA swab. Later, the State referenced these invocations when questioning an officer witness. (4R.R. 116-17). Defense counsel objected to the State's reference to this invocation, *id.*, showing that it was not a strategic decision to accidentally admit that invocation by other means. Additionally, counsel had objected to the interrogation video as a whole (even though a portion of it was needed for the self-defense instruction) on the ground of improper predicate but failed to specifically object to the invocation portions of the video on constitutional grounds and request a redaction. An error under a particular ground is not preserved if the objection was made under different grounds. *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim.

App. 2014) (a "point of error on appeal must comport with the objection made at trial"). There was clearly no strategic reason to fail to object to the video-recorded invocations on the constitutional grounds. *Brasfield v. State*, 30 S.W.3d 502, 505 (Tex. App.--Texarkana 2000, no pet.) (finding deficient performance of counsel for failing to adequately object and preserve issue); *Vasquez*, 830 S.W.2d at 950-51 (holding it was "clearly deficient" from the cold record for defense counsel to have failed to request a necessity instruction), cited by *Thompson*, 9 S.W.3d at 816 (Meyers, J., dissenting) (opining that circumstances, including defense counsel's other choices in objecting to the same evidence, can "overcome the *Strickland* presumption that counsel's omission was the result of a calculated decision based on a reasonable trial strategy").

ii. Prejudice Prong

Defense counsel's failure to object to, and request a redaction of, Appellant's invocations of his Constitutional rights in the interrogation video was prejudicial. To show prejudice in an ineffective assistance claim for failure to object, one must show the trial court would have erred in "overruling such objection." *Ex parte Parra*, 420 S.W.3d 821, 824-25 (Tex. Crim. App. 2013); *see also McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992) (to show prejudice, one must show the result would have been different).

Had defense counsel objected to and requested redactions of Appellant's statement that he would get an attorney and his subsequent official invocation of his right to an attorney, as well as his refusal to consent to a DNA swab, the trial court

would have been required to sustain that objection. *Hardie v. State*, 807 S.W.2d 319, 322 (Tex. Crim. App. 1991), citing *Miranda v. Arizona*, 384 U.S. 436 (1966). A "videotape which include[s] defendant's clear invocation of his right to [an] attorney [is] inadmissible." *Loy v. State*, 982 S.W.2d 616, 616-18 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (reversing and remanding for new trial because the erroneous admission of a video that shows such an invocation is not harmless); *see also Cooper v. State*, 961 S.W.2d 222, 226 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) ("Evidence of invoking the right to terminate an interview is inadmissible as evidence of guilt."); *Kalisz v. State*, 32 S.W.3d 718, 721 (Tex. App.—Houston [14th Dist.] 2000, pet ref'd) ("evidence of [a defendant's] invocation of his right to counsel is inadmissible as evidence of guilt"); *Dumas v. State*, 812 S.W.2d 611, 614 (Tex. App.—Dallas 1991, pet. ref'd) ("The adverse use of evidence that a defendant invoked a right or privilege granted to him by the Constitution is impermissible."), citing *Hardie*, *supra*, & *Doyle v. Ohio*, 426 U.S. 610 (1976); *Reid v. State*, No. 03-01-00256-CR, 2002 WL 570633 at *1, 5-7 (Tex. App.—Austin, April 18, 2002, no pet.) (reversing on ground that "allowing jury to consider portion of videotape showing defendant's invocation of his right to remain silent" was not harmless).

The invocations themselves are inherently prejudicial: this Court has recognized that the introduction of and any reference to "a defendant's express invocation" of his constitutional rights are "prejudicial to a defendant because the introduction of such evidence invites the jury to draw an adverse inference of guilt from the exercise of a

constitutional right." *Friend v. State*, 473 S.W.3d 470, 478 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd), citing *Hardie v. State*, 807 S.W.2d 319, 322 (Tex. Crim. App. 1991). Here, Appellant mentioned in the interrogation that he was going to get an attorney. (9R.R. St. Ex. 122 at 1:09:55-1:10:00). Several minutes later, Appellant made an express invocation of his right to an attorney and to refuse to consent to a DNA swab. (9R.R. St. Ex. 122 at 1:21:34-1:21:56). This evidence is highly inherently prejudicial.

Had defense counsel objected to the admission of these statements and requested their redaction from the video, the trial court would have been required to sustain that objection and grant the request; additionally, evidence of these invocations was prejudicial. *See Hardie*, 807 S.W.2d at 322 (agreeing with the Court of Appeals that it could not find harmless beyond a reasonable doubt the admission of "evidence [of] the audio portion of the videotape wherein appellant invoked his right to counsel"). Therefore, this Court should reverse and remand for a new trial.

PRAYER

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served to the Harris County District Attorney's Office on November 4, 2024.

/s/ Sophie Bossart
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CERTIFICATE OF COMPLIANCE

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Associated Case Party: RickyBrown

Name	BarNumber	Email	TimestampSubmitted	Status
Sophie Bossart	24129374	sophie.bossart@pdo.hctx.net	11/4/2024 7:49:32 PM	SENT

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