No. 01-24-00830-CR

In the First Court of Appeals
Houston, Texas

LAVILLIA CHANTAEL SPRY,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 185th Judicial District Court
Harris County, Texas
Leslie Yates, Judge Presiding by Assignment
In Cause No. 1755975

APPELLANT'S OPENING BRIEF

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To the Honorable Court of Appeals:

Peace officers have dangerous jobs. The law should—and does—protect them. But when a person kills a peace officer, the law should—and does—protect that person, too. The law requires that the State prove its case, including enhancements, beyond a reasonable doubt, and the law requires that the defendant be punished only in accordance with what the State proves at trial. The law also requires that the defendant have effective assistance of counsel. None of that happened here.

STATEMENT OF THE CASE

Lavillia Spry was indicted for intoxication manslaughter of a peace officer, a first-degree felony.[1] Tex. Penal Code §§ 49.08(a), 49.09(b-2). She pleaded not guilty, but a jury convicted her and made an affirmative deadly-weapon finding.[2] The jury assessed punishment at 43 years' confinement and a $10,000 fine, and the court pronounced sentence.[3] This appeal follows.

[1] Clerk's Record (CR):49; Reporter's Record volume (RR) 4:22–23.

[2] CR:858, 860, 876; RR4:23; RR8:68–69.

[3] CR:871, 876; RR9:176, RR10:4.

Statement Regarding Oral Argument

We see peace officers directing traffic all the time, so it's easy to take for granted the fact that they're not doing that as part of their general duties as peace officers. Far from it—they're usually working an "extra job," or they've been authorized by a local government. But we don't see that part. We simply see the officer, in the road, waving at cars. When it comes to the law—especially when decades of liberty is at stake—what we see isn't good enough. What matters is what the law says. The law says that directing traffic, without some underlying special authorization, is not a duty of peace officers. We should talk about why that is. Oral argument would help cut through any lingering cognitive biases against the plain language of the law.

Similarly, we see ineffective-assistance claims fail on direct appeal all the time because the record usually isn't developed enough to judge counsel's performance. But sometimes, as here, the record is clear: Fresh case law from the Supreme Court materially affected this case, yet counsel either didn't know about it or didn't use it. Neither option is excusable. We should talk about why it is so important that this kind of failure be addressed now rather than years later in a writ. Oral argument would help this Court decide that the record shows deficient performance in this case.

Issues Presented

1. **Sufficiency of the Evidence—Enhancement Element.** Sgt. Gutierrez was a peace officer working an "extra job" directing traffic, but the State introduced only unsupported opinion testimony that directing traffic is an official duty of peace officers. Is the evidence insufficient to prove that he was discharging an "official duty" when killed?

2. **Ineffective Assistance of Counsel—Failure to Make Confrontation Objection.** The assistant medical examiner testified about her opinions formed from an independent review of another medical examiner's autopsy report, photos, diagrams, x-rays, and testing. *Smith v. Arizona* makes clear that this testimony violated the Confrontation Clause, but counsel did not make a Confrontation objection. Was counsel ineffective for failing to make this objection?

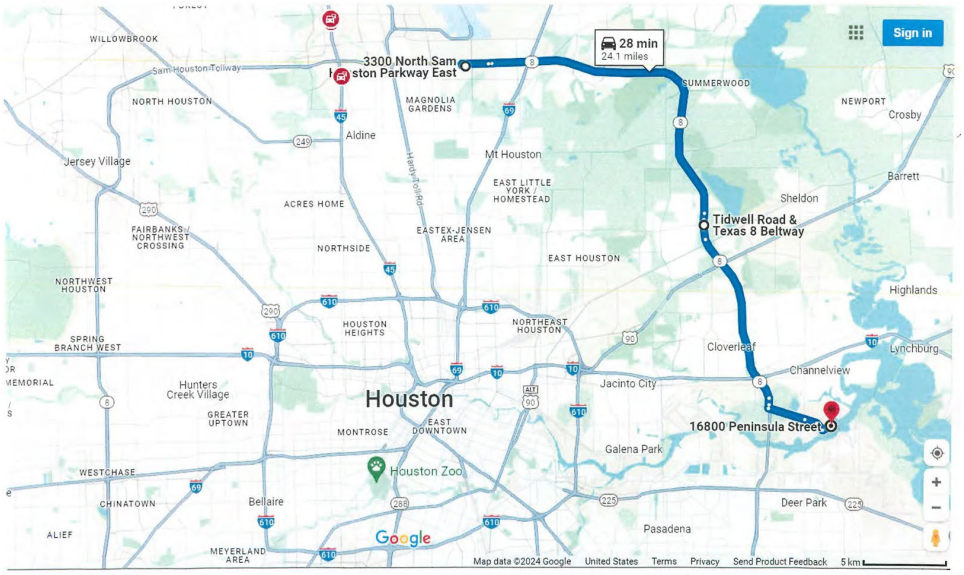
3. **Judgment—Offense, Fine, and Fee Assessments.** The judgment omits the statute of offense and includes both an unpronounced fine and improperly assessed reimbursement fees. Should this Court modify the judgment to correct these errors?

4. **Bill of Costs—Fine and Fee Assessments.** The bill of costs contains fines and improperly assessed reimbursement fees. Should this Court delete those from the bill?

STATEMENT OF FACTS

The Convoy

On January 23, 2022, a Mammoet-contracted convoy was transporting a large, oversize load down the Beltway 8 frontage road from JFK Blvd to the Port of Houston.[4] The convoy was escorted by both private escort trucks and off-duty motorcycle officers working an "extra job."[5]



SX124: Map showing the convoy's intended route.

The private escort trucks watched for obstructions while the "extra job" motorcycle officers worked in a rotation or "leapfrog" pattern to block intersections and highway exit ramps to prevent motorists from running into the load.[6]

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[4] RR4:50, 228; RR5:117, 144, 245–46; RR6:14, 116; SX124.

[5] RR5:111, 144, 165, 176, 181, 239, 245–46; RR6:115.

[6] RR5:113–14, 121–23, 178, 204; RR6:17, 116, 118.

"Extra Jobs"

Officers working an "extra job" as motorcycle escorts are in uniform, but off-duty.[7] They are paid by the private company rather than the county.[8] They purchase their own motorcycles.[9] Being off-duty, they go straight to the job from their homes, and they return straight home when the job is complete.[10] Officers working an "extra job" do not leave the job to respond to regular law-enforcement calls.[11]

The Collision

One of the off-duty officers working an "extra job" that night was Sergeant Ramon Gutierrez of the Harris County Sheriff's Office.[12] As the convoy approached Tidwell Road in unincorporated Harris County at around 12:20 am. on January 24, Sgt. Gutierrez parked his motorcycle on the Beltway 8 exit ramp to prevent cars from exiting the highway while the convoy passed below.[13] He was wearing a bright green reflective jacket and reflective gloves, holding

[7] RR4:234–35; RR6:9.

[8] RR4:236, 241.

[9] RR6:10.

[10] RR6:12, 15.

[11] RR6:14, 159–60.

[12] RR4:39, 234, 239; RR5:129, 170; RR7:233.

[13] RR4:43–44, 52; RR5:126, 168–69, 254.

a red-cone-tipped flashlight, and standing next to his motorcycle, which had about half of its lights illuminated and flashing.[14]

Meanwhile, Lavillia Spry was driving home from the Royalty Bar & Lounge, where she had been drinking for several hours.[15] Driving south on Beltway 8, she tried to exit at Tidwell Road where Sgt. Gutierrez was blocking the ramp.[16] He signaled for her to stop, but she didn't stop.[17] Her car struck Sgt. Gutierrez and dragged him about 125 feet down the exit ramp before he rolled away.[18] She kept driving down the ramp, turned right onto Tidwell heading west, and drove away.[19]

The Chase

Chris Wamer, one of the private escort-truck drivers, saw the collision and radioed ahead that an officer had been hit and that they needed to stop the car.[20] Harris County Sheriff's Deputy Aaron Baldwin, another off-duty motorcycle officer escorting the convoy, chased Spry and signaled for her to stop.[21] After about a mile, Spry

[14] RR4:52, 74, 117–19; RR5:129–30, 170, 259–60, 267–73.

[15] RR5:22, 31–32, 34–55, 58; RR6:244, 250–67; SX121–22, 123, 184.

[16] RR5:127.

[17] RR5:126–27, 131, 171.

[18] RR4:97–99, 103, RR5:132, 273–82; RR6:70–72, 77.

[19] RR5:191, SX172 at 00:20:30 – 00:20:51.

[20] RR5:132, 135, 171, 191.

[21] RR6:126, 131, 162, SX172, 173, 175.

turned into a neighborhood and stopped.[22] Baldwin drew his weapon and ordered her out of the car at gunpoint.[23] When she got out of the car, Baldwin holstered his gun and handcuffed her.[24]

The Death

Back at the ramp, Wamer and Deputy Christopher Hughes, another off-duty motorcycle officer escorting the convoy, both checked on Sgt. Gutierrez, who was still alive but having a hard time breathing.[25] Sgt. Gutierrez was LifeFlighted to Memorial Hermann Hospital, but he passed away.[26] The fatal injury was a rib fracture that collapsed his lung and lacerated his heart.[27]

The Arrest

Based on signs of intoxication, including her performance on standardized field sobriety tests, Harris County Sheriff's Deputies arrested Spry and took her to jail, where they conducted sobriety tests again.[28] Deputy Timothy Cadwell got a search warrant for Spry's blood, which was drawn at 3:12 a.m. and revealed a blood-

[22] RR6:138, 144.

[23] RR6:144–46, 166; SX 136, 137.

[24] RR6:145–46, 166.

[25] RR5:138–3, 254.

[26] RR5:141, 228–29, 255.

[27] RR5:91–97.

[28] RR4:32–33, 161–208; RR6:187, 195, 207; SX179.

alcohol concentration of 0.164 grams per 100 milliliters.[29] Spry also gave a breath specimen at 3:50 a.m., which showed a breath-alcohol concentration of 0.128 grams per 210 liters.[30]

Deputies brought Spry's car back to the exit ramp, where they matched it to debris left on the road during the collision.[31] Green fibers from Sgt. Gutierrez's jacket were stuck to the bottom of Spry's car.[32]

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[29] RR6:199, 208–13; RR7:10, 50, 55; SX180–83, 185–186.

[30] RR6:198, 215, 224; RR7:120; SX179, 187.

[31] RR4:72–73, 83–85, 121; SX22–35, 58–100, 104.

[32] RR4:138–40; RR6:59; SX85–94.

Summary of the Argument

Issue One

To prove an enhancement element—as with any essential element—the State must produce evidence from which a rational jury could find the element beyond a reasonable doubt without relying on unsupported speculation. When such an element turns on a legal conclusion, neither factually unsupported opinion testimony about the legal conclusion nor evidence of a fact that "is not necessarily determinative" of the legal conclusion is sufficient to prove the element beyond a reasonable doubt.

In this case, to enhance the offense to a first-degree felony, the State had to prove that the decedent, an off-duty peace officer who was directing traffic, was discharging an "official duty" at the time of the offense. But 1) directing is not a general duty of peace officers, 2) the State introduced no evidence that a specific duty existed in this case, and 3) the witnesses' opinion testimony that directing traffic is an "official duty" was factually unsupported.

The State therefore failed to prove the enhancement element beyond a reasonable doubt. The appropriate remedy in this case is for this Court to reform the judgment to reflect that Spry was convicted of a second-degree felony and to remand the case for a new punishment hearing.

Issue Two

Counsel was constitutionally ineffective when he failed to object to the autopsy testimony under the Confrontation Clause. In *Smith v. Arizona*—decided four months before this trial—the United States Supreme Court held that the Confrontation Clause is implicated when an expert witness relies on the truthfulness of a non-testifying witness's out-of-court report to form their own opinions. Counsel should have been aware of that case and known that the autopsy testimony in this case was inadmissible under the Confrontation Clause.

If he wasn't, there was no strategic reason for his ignorance. If he was, there was no strategic reason not to make a Confrontation objection. Had counsel objected, the result of the proceeding would have been different because either 1) the court would have sustained the objection and the remaining evidence would have been insufficient to prove causation, or 2) the court would have overruled the objection and the case would have been reversed on appeal.

Issue Three

The judgment contains the following errors that this Court should correct:

- It does not reflect the statute for the offense.
- It assesses a $100 EMS fine, even though that fine was not orally pronounced. When it comes to fines, the oral pronouncement controls.
- It assesses $15 in arrest fees, when only $10 is supported by the record.
- It assesses $15 in release fees, when only $10 is supported by the record. This Court's precedent that a person is "released" when they are transferred to prison is flawed.
- It assesses $1,065 in witness-summoning fees, when only $200 is supported by the record. Of the 213 subpoenas with returns, only 40 were validly served by a peace officer.

Issue Four

The bill of costs includes two fines, one of which should not have been assessed at all and both of which are not costs and should not be included in the bill. The bill also includes the improperly assessed reimbursement fees that were included in the judgment. This Court should delete the fines and the improper fees from the bill.

ARGUMENT

Issue One

1. The evidence is legally insufficient to prove the first-degree enhancement element.

The State presented legally insufficient evidence to prove that Sgt. Gutierrez was in the actual discharge of an official duty, which was required to convict Spry of a first-degree felony rather than a second. This Court should reform the judgment of conviction and remand for a new punishment hearing.

1.1. Due Process requires that the State prove every element—including enhancement elements—beyond a reasonable doubt.

"The Fourteenth Amendment's guarantee of due process of law prohibits a criminal defendant from being convicted of an offense and denied his liberty except upon proof sufficient to persuade a rational trier of fact beyond a reasonable doubt of every fact necessary to constitute the offense." *Baltimore v. State*, 689 S.W.3d 331, 340 (Tex. Crim. App. 2024) (citing *In re Winship*, 397 U.S. 358, 364 (1970); *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003)). Evidence supporting a conviction is legally sufficient only if a rational trier of fact could have found that the defendant committed each element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Baltimore*, 689 S.W.3d at 340.

This includes statutory enhancement elements. *Baltimore,* 689 S.W.3d at 341–42 (citing *Curlee v. State*, 620 S.W.3d 767, 779 (Tex. Crim. App. 2021); *Wood v. State*, 486 S.W.3d 583, 589 (Tex. Crim. App. 2016)).

The State has a burden of *production* as well as persuasion: It bears the "burden of producing the evidence and convincing the factfinder" beyond a reasonable doubt that the defendant is guilty. *Id.* n.22 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). A "mere modicum" of evidence is not sufficient to meet this burden. *Id.* at 340 (quoting *McGinn v. State*, 961 S.W.2d 161, 168 (Tex. Crim. App. 1998)). The question "is not whether there was *any* evidence to support a conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt." *Id.* (emphasis in original).

A jury may draw reasonable inferences from the evidence, so long as each inference is supported by the evidence produced at trial, but the jury may not come to conclusions based on mere speculation or factually unsupported inferences or presumptions. *Id.* at 342 (citing *Jackson*, 443 U.S. at 319; *Metcalf v. State*, 597 S.W.3d 847, 855 (Tex. Crim. App. 2020); *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007)).

1.2. For intoxication manslaughter to be a first-degree felony, the State must prove that the decedent was a peace officer "in the actual discharge of an official duty."

The penal code provides that a person commits the offense of intoxication manslaughter if:

> … the person operates a motor vehicle in a public place … and … is intoxicated and by reason of that intoxication causes the death of another by accident or mistake.

Tex. Penal Code § 49.08(a).

Intoxication manslaughter is usually a second-degree felony. *Id.* § 49.08(b). It is a first-degree felony, however, if:

> … it is shown on the trial of the offense that the person caused the death of [a peace officer … while the officer … was in the actual discharge of an official duty].

Tex. Penal Code § 49.09(b-2) (incorporating subsection (b-1)(2)).

Therefore, in order to prove the statutory enhancement that makes intoxication manslaughter a first-degree felony in this case, the State had to produce sufficient evidence that Sgt. Gutierrez was a peace officer "in the actual discharge of an official duty."

That question calls for a legal conclusion: Is directing traffic an official duty? Under the principles set forth in *Baltimore*, the State did not answer that question in this case.

1.3. An enhancement based on a legal conclusion requires more than unsupported opinion testimony or facts that are "not necessarily determinative" of the legal conclusion.

In *Baltimore*, the State charged the defendant with unlawfully carrying a weapon, which is typically a class A misdemeanor, but the State alleged that the defendant committed the offense on a "premises" licensed to sell alcoholic beverages, which made the offense a third-degree felony. *Baltimore*, 689 S.W.3d at 334–35.

The Court of Criminal Appeals held that the evidence was insufficient to prove that the location of the offense was part of a licensed "premises." *Id.* at 334. In doing so, it set out two principles for evaluating the sufficiency of the evidence when a statutory enhancement element is based on a legal conclusion: 1) there must be more than unsupported opinion testimony, and 2) there must be more than facts that are "not necessarily determinative" to the legal conclusion. *Id.* at 344–48.

1.3.1. Unsupported opinion testimony about a legal conclusion is legally insufficient to prove an enhancement element.

First, evidence is legally insufficient to prove an enhancement provision if it is shown only by witnesses "who gave their opinions that an enhancement provision had been legally established without providing any factual basis for those opinions." *Baltimore*, 689 S.W.3d at 347.

In *Baltimore*, one police officer and one lay witness each testified about the legal status of a parking lot outside a bar. *Id.* at 335, 344–45. The officer testified that the parking lot was the "premises" of the bar. *Id.* at 335–36, 344. The lay witness, a bar patron, testified that the parking lot was the "property" of the bar. *Id*. at 337, 345. The Court held that, in the absence of any factual support for these opinions, the testimony was insufficient to prove that the parking lot was the "premises" of the bar. *Id.* at 344–48. This holding was based on two principles.

First, factually unsupported opinion testimony is insufficient to support a legal conclusion about the existence of an element that turns on the legal status of something. *Id.* at 344 (citing *Curlee*, 620 S.W.3d at 785 (unsupported opinion testimony that a playground was "open to the public" was insufficient to prove that the playground was "open to the public" for purposes of the drug-free-zone enhancement)). Without a factual basis for the opinion, it is nothing more than "a factually unsupported inference or presumption." *Id.*

Second, factually unsupported expert testimony is legally insufficient to support a conviction because it does not allow the jury to draw any reasonable inferences. *Id.* (citing *Edwards v. State*, 666 S.W.3d 571, 576–77 (Tex. Crim. App. 2023) (hypothetical testimony about possible side effects of the amount of cocaine in an infant's

system was not sufficient to prove that the defendant caused "serious mental deficiency, impairment, or injury" by passing cocaine to the infant through breastmilk)).

The Court then reiterated its holding in *Curlee* that "a jury engages in speculation if a witness'[s] opinion on a legal issue also amounts to speculation when the State fails to present facts supporting that opinion." *Baltimore*, 689 S.W.3d at 346–47. "This holding is not new," the Court reminded everyone. *Id.* at 347.[33]

1.3.2. A fact does not sufficiently prove a legal conclusion to support an enhancement element if the fact "is not necessarily determinative" of the legal conclusion.

Second, even if a "fact" is in evidence, a jury cannot reasonably infer a legal conclusion from that fact if it "is not necessarily determinative" of the legal conclusion. *Baltimore*, 689 S.W.3d at 345.

In *Baltimore*, the State argued that the jury could infer that the parking lot was the "premises" of the bar based on its "close

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[33] Among its precedents, the Court cited *Brister v. State*, 449 S.W.3d 490, 495 (Tex. Crim. App. 2014) (holding that officer's statement that the defendant violated a traffic law, combined with two other officers' testimony that the defendant's vehicle was capable of causing serious bodily injury or death, was legally insufficient to prove the vehicle was a deadly weapon when there was no evidence that the defendant caused any other vehicle or person to be in actual danger); and *Flores v. State*, 620 S.W.3d 154, 156–61 (Tex. Crim. App. 2021) (holding that two officers' testimony that a drill used in a robbery could be used as a deadly weapon was insufficient to support a deadly-weapon finding when there was no evidence that the defendant used or intended to use the drill in a manner that was capable of causing death or serious bodily injury).

proximity to the bar's entrance." *Id.* The Court rejected this argument for two reasons.

First, the Court pointed out that, under the Texas Alcoholic Beverage Code, "a parking lot is not necessarily 'directly or indirectly under the control' of an establishment simply because the lot is connected to or adjacent to the establishment." *Id.* (citing Tex. Alco. Bev. Code § 11.49(a), which defines "premises").

Second, the Court noted that the Alcoholic Beverage Code specifically sets out circumstances in which "a permit or license applicant can exclude a portion of the property from its 'premises.'" *Id.* (citing Tex. Alco. Bev. Code § 11.49(b), which allows the applicant to "designate a portion" of property "to be excluded from the licensed premises").

Accordingly, the Court said, the "proximity of the parking lot to an establishment *is not necessarily determinative* of control and to conclude otherwise would be mere speculation." *Id.* (emphasis added).

1.4. A peace officer is discharging an official duty if he is performing a duty imposed by law.

As in *Baltimore*, where the question of whether a parking lot was a "premises" was turned on a legal conclusion, here the question of whether a peace officer's conduct is an "official duty" likewise turns on a legal conclusion: To prove that a peace officer was discharging

an official duty, the State must show that the officer was performing a duty imposed by law on peace officers. *Cuevas v. State*, 576 S.W.3d 398, 399–400 (Tex. Crim. App. 2019).

In *Cuevas*, a Bee County Constable "was moonlighting in his constable uniform as a security guard" at a "licensed liquor establishment." *Id.* at 399. Cuevas assaulted the guard after the guard repeatedly tried to stop him from taking alcohol outside the premises. *Id.* The Court of Criminal Appeals held that the evidence was sufficient to prove that the guard was discharging an "official duty," even though he was working as "private security." *Id.* at 399.

The evidence was sufficient to prove an "official duty," the Court said, because the Texas Alcoholic Beverage Code imposes a general duty on all peace officers to enforce the provisions of that code. *Id.* at 399–400 (citing Tex. Alco. Bev. Code § 101.07). One provision of the alcoholic beverage code "prohibits mixed beverage permit holders from allowing customers to take drinks off premises." *Id.* (citing Tex. Alco. Bev. Code § 28.10(b)). When the guard tried to stop Cuevas from taking a drink off the premises, he was enforcing that provision, and therefore he was discharging an "official duty" imposed by the code. *Id.*

1.4.1. The State proved that Sgt. Gutierrez was a peace officer directing traffic.

In this case, the State presented evidence that Sgt. Gutierrez was a peace officer directing traffic. It was undisputed that Sgt. Gutierrez was a Harris County Sheriff's Deputy.[34] Sheriff's Deputies are peace officers. Tex. Code Crim. Proc. art. 2A.001(1). And it was undisputed that Sgt. Gutierrez was directing traffic on the exit ramp when he was hit.[35] What the State didn't prove, however, was that directing traffic was a duty imposed by law on peace officers generally or on Sgt. Gutierrez specifically.

1.4.2. But "directing traffic" isn't a general duty imposed by law on peace officers.

"Directing traffic" isn't a general duty of peace officers. The Texas Code of Criminal Procedure sets out the general duties of peace officers:

> GENERAL POWERS AND DUTIES OF PEACE OFFICERS. Each peace officer shall:
>
> > (1) preserve the peace within the officer's jurisdiction using all lawful means;
> >
> > (2) in every case authorized by this code, interfere without a warrant to prevent or suppress crime;

[34] RR4:40.

[35] RR5:126, 254.

> (3) execute all lawful process issued to the officer by a magistrate or court;
>
> (4) give notice to an appropriate magistrate of all offenses committed in the officer's jurisdiction, where the officer has good reason to believe there has been a violation of the penal law;
>
> (5) when authorized by law, arrest an offender without a warrant so the offender may be taken before the proper magistrate or court and be tried;
>
> (6) take possession of a child under Article 63.009(g); and
>
> (7) on a request made by the Texas Civil Commitment Office, execute an emergency detention order issued by that office under Section 841.0837, Health and Safety Code.

Tex. Code Crim. Proc. art. 2A.051. "Directing traffic" is not among these enumerated duties.

The Texas Transportation Code doesn't give peace officers the general duty to direct traffic, either. Instead, that code merely recognizes that *some* officers can be authorized to direct traffic:

> (4) "Police officer" means an officer ***authorized to direct traffic*** or arrest persons who violate traffic regulations.

Tex. Transp. Code § 541.002(4) (emphasis added).

Officers "authorized to direct traffic" are expressly distinguished from officers authorized to arrest violators—a group that includes all

peace officers. *Id.* § 543.001 (authorizing "any peace officer" to "arrest without warrant a person found committing a violation of" the Rules of the Road). If all peace officers had a general duty to direct traffic, then this provision would be redundant.

This case is therefore the opposite of *Cuevas*, where there was a statute that imposed a duty on all peace officers. *Cuevas*, 576 S.W.3d at 399–400. And because peace officers are not generally authorized to direct traffic, the fact that a person is a peace officer "is not necessarily determinative" that he has a duty to direct traffic. *Baltimore*, 689 S.W.3d at 345. Just as a parking lot is not a "premises" simply because of its proximity to an establishment, directing traffic is not an "official duty" simply because it is done by a peace officer. *Id.*

Thus, the mere fact that Sgt. Gutierrez was a peace officer directing traffic is not sufficient proof that he was discharging "an official duty" when he was killed.

1.5. Directing traffic *can* be a duty of a peace officer under certain circumstances, but the State presented no evidence those circumstances in this case.

Instead of having a general statutory duty to direct traffic, peace officers can acquire a specific duty to direct traffic several different ways. The State failed to prove any of them in this case.

1.5.1. State Troopers are authorized to direct traffic, but Sgt. Gutierrez wasn't a State Trooper.

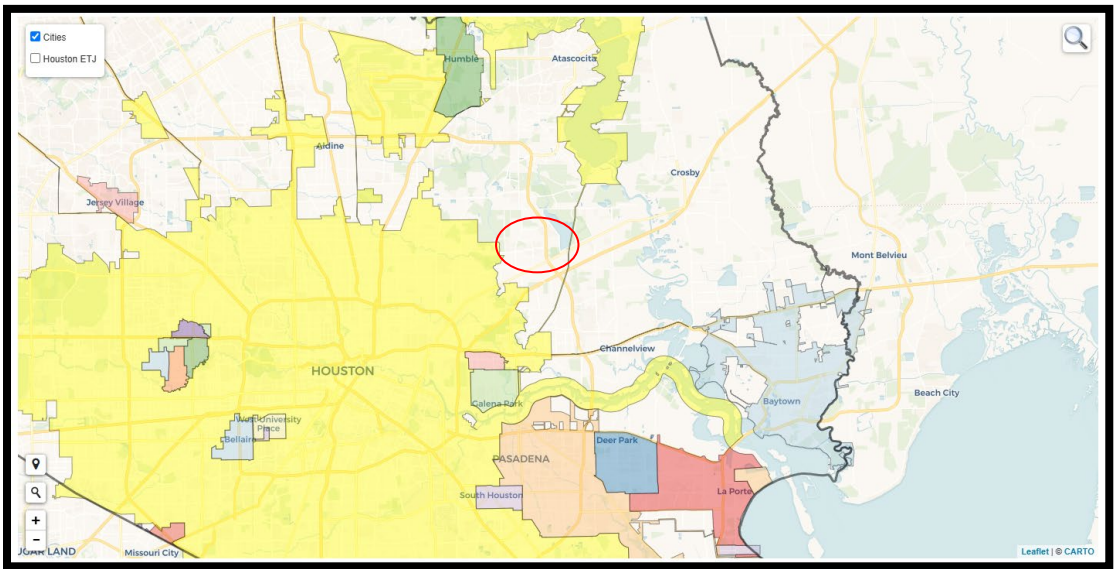
One way of acquiring the duty to direct traffic is assignment of authority by the Department of Public Safety, which has given the Texas Highway Patrol the authority to direct traffic. *See* 37 Tex. Admin. Code § 3.41. In this case, however, the State presented no evidence that Sgt. Gutierrez was a State Trooper—to the contrary, it was undisputed that he was a Harris County Sheriff's Deputy.

1.5.2. Local governments can grant authority to direct traffic, but no local government granted such authority in this case.

Another way is for a local government to grant the officer authority to direct traffic. *See VIA Metropolitan Transit v. Garcia*, 397 S.W.3d 702, 706–07 (Tex. App.—San Antonio 2012, pet. denied). This is because traffic regulation is a governmental function. *Id.* (citing Tex. Civ. Prac. & Rem. Code § 101.0215(a)(21)). And local government is vested with the authority to control and regulate traffic. *Id.* (citing, among others, Tex. Transp. Code § 542.202(a)(1) (which allows local government to regulate traffic "by police officers or traffic-control devices.")).

In this case, however, the State presented no evidence that a local government had authorized peace officers to direct traffic at the scene of the accident.

Nor could it. The intersection of Beltway 8 and Tidwell Road is in unincorporated Harris County. No provision of the Harris County Code generally authorizes peace officers to direct traffic. Instead, the County Code merely gives law enforcement officers specific authority to divert traffic while towing a vehicle from a scene. Harris County Code, ch. 28, subch. 28G, § IV-A(9) (June 9, 2020, amended Nov. 12, 2021).

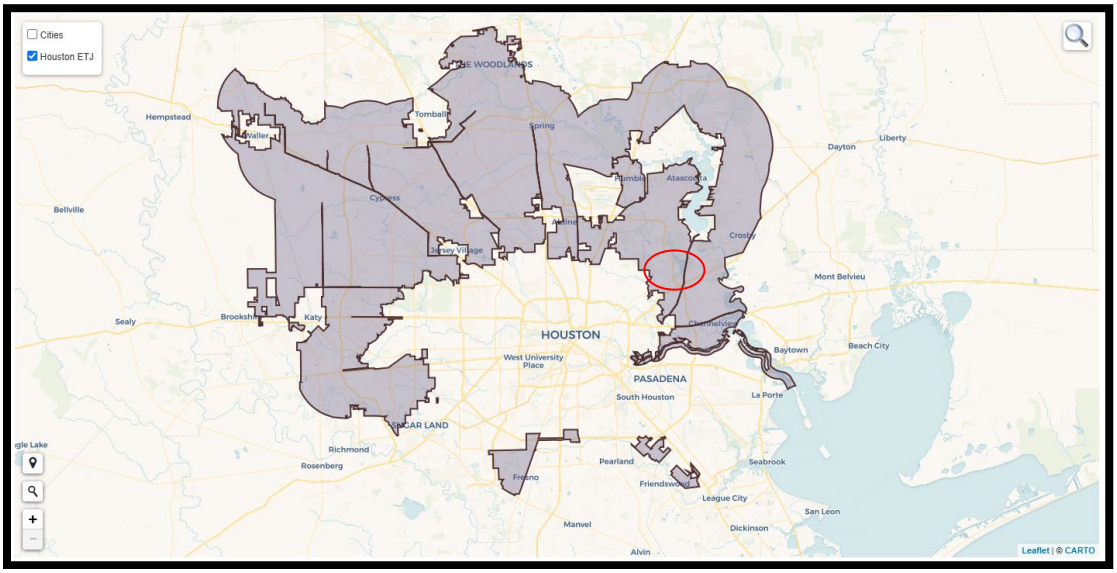


Screenshot of Harris County's official map with all incorporated cities highlighted, showing that the SH8–Tidwell intersection (circled) is not in any incorporated city.[36]

The intersection of Beltway 8 and Tidwell Road is also within the City of Houston's Extraterritorial Jurisdiction (ETJ). A municipality's ETJ comprises areas outside the municipality that are designated "to

[36] Harris County, Texas, Economic Development, *Map Room: Cities Within Harris County*, https://hcoed.harriscountytx.gov/MapRoom_cities.aspx (last accessed April 7, 2025).

promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities." Tex. Loc. Gov't Code § 42.001. For a city with a population of 100,000 or more, such as Houston, the ETJ area includes areas within five miles of the corporate boundaries of the city. Tex. Local Gov't Code § 42.201(a)(5).



Screenshot of Harris County's official map with Houston's ETJ highlighted, showing that the SH8–Tidwell intersection (circled) is in that area.[37]

Unlike Harris County, the city of Houston *has* authorized police officers to direct traffic by local ordinance. Houston, Tex., Code of Ordinances, ch. 45, art. I, § 45-9 (1968). But Houston has not used its ETJ authority to confer that duty in ETJ areas. Instead, Houston has exercised only limited regulatory authority over its ETJ area. *See, e.g.*, Houston, Tex. Code of Ordinances §§ 2-73, 9-351, 23-1, 32-206,

[37] *Id.*

33-15, 33-51, 41-21, 47-301, and all of chapter 42. The city's traffic regulations in chapter 45 are not included.

Thus, no local government—neither Harris County nor the City of Houston, via its ETJ—has given peace officers the general duty to direct traffic at the exit ramp off Beltway 8 at Tidwell Road. Therefore, the fact that Sgt. Gutierrez was directing traffic at that location is not sufficient to prove that he was discharging an official duty. *Baltimore*, 689 S.W.3d at 345.

1.5.3. An oversize load permit from TxDOT can require a peace officer to direct traffic, but the State presented no evidence of such a permit in this case.

A third way is for the officer to conduct authorized escort assistance as required by the Texas Department of Motor Vehicles (DMV) and the Texas Department of Transportation (TxDOT). The DMV Board has rulemaking authority over permits for oversize or overweight vehicles. Tex. Transp. Code § 623.002. The Board has, by rule, given TxDOT the authority to require law enforcement assistance "to control traffic when a permitted vehicle is being moved within the corporate limits of a city, or at such times when law enforcement assistance would provide for the safe movement of the permitted vehicle and the traveling public." 43 Tex. Admin. Code § 219.11(k)(1)(B).

In this case, however, the State presented no evidence that there was a legal permit in which TxDOT had required law enforcement to control traffic during the move. Quite to the contrary, the State successfully fought *not* to admit the permit into evidence, and no permit is in the appellate record.[38]

The State didn't present any evidence that TxDOT generally requires law enforcement to control traffic on all large loads, either. TxDOT's Houston District mandates front and rear law-enforcement escorts as a default rule only for loads that are more than 20 feet wide. Tex. Dep't of Transp., Houston District, Restriction Number 17830 (enacted January 8, 2018).[39] Thus, in lieu of a permit, the State could have presented evidence of the load's width. But it didn't. The record contains no evidence of how wide the load was.

Because the State did not prove that there was a TxDOT permit requiring law enforcement officers to direct traffic while escorting the load in this case, the fact that Sgt. Gutierrez was directing traffic

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[38] CR:540 (motion in limine); RR4:9–15; RR6:5–7. The State didn't want the jury to hear that the load was not properly permitted for a night move, arguing that whether the move itself was "lawful" was irrelevant, and the trial court agreed. *Id.* That is a separate question, however, from whether the State had a burden to produce the permit in order to prove that Sgt. Gutierrez had been assigned a duty to direct traffic in the first place.

[39] *See* Texas Department of Transportation, *Permit Restrictions by District: Houston District*, https://ftp.txdmv.gov/pub/txdmv-info/mcd/permit_restrictions/Houston.pdf (last visited April 7, 2025).

for the convoy is not sufficient proof that he was discharging an official duty. *Baltimore*, 689 S.W.3d at 345.

1.6. The State presented only unsupported opinion testimony that Sgt. Gutierrez was discharging an official duty.

Other than the nondeterminative fact that Sgt. Gutierrez was a peace officer directing traffic, the only other evidence that the State offered to prove the enhancement was opinion testimony by four witnesses:

1) Deputy Jason Hildebrandt testified that "traffic control" was an "official duty," as was "shutting down the lane."[40]

2) Deputy Christopher Hughes testified that the "official duty" of a motorcycle escort is to "provide traffic control to the motoring public and for the oversize load."[41] He added that directing traffic is an "official duty" no different from arresting people or writing tickets.[42]

3) Accident reconstructionist C.J. Meaux testified that "doing … traffic control" is an "official duty."[43]

4) Deputy Daniel Drake likewise testified that "doing traffic control" is an "official duty."[44]

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[40] RR4:120.

[41] RR5:245; RR6:31.

[42] RR6:31–32.

[43] RR6:80.

[44] RR7:196.

This opinion testimony was factually unsupported and therefore speculative and presumptive. As demonstrated above, directing traffic is not a general duty of peace officers, and the State presented no facts from which any of these officers could opine that Sgt. Gutierrez had been assigned such a duty. Just as unsupported opinion testimony that a playground is "open to the public" is insufficient to prove that conclusion, unsupported opinion testimony that traffic control is an "official duty" is insufficient to prove the same. *Baltimore*, 689 S.W.3d at 344; *Curlee*, 620 S.W.3d at 785).

The officers' unsupported opinions left the jury unable to draw any reasonable inferences. *Baltimore,* 689 S.W.3d at 344. The jury could reasonably conclude that Sgt. Gutierrez was a peace officer, and it could reasonably conclude that he was directing traffic. But without any proof that Sgt. Gutierrez had been given a duty to direct traffic, any inference that his directing traffic was an "official duty" was pure, unsupported speculation.

The State had a burden to "present facts" supporting a conclusion that Sgt. Gutierrez was discharging an official duty. *Id.* at 346–47. It didn't meet that burden.

1.7. Cases that have found sufficient evidence of an "official duty" show that more evidence is required.

1.7.1. In *Torres*, the only case that construes the intoxication enhancement, the officer was on-duty, in uniform, on patrol, and ready to respond to any call that came in.

Only one case—an unpublished decision from Beaumont—has ever considered whether the evidence was sufficient to find that the decedent was a peace officer in the "actual discharge of an official duty" in the intoxication-manslaughter context. *Torres v. State*, No. 09-22-00269-CR, 2023 WL 6613129 (Tex. App.—Beaumont Oct. 11, 2023, no pet.) (mem. op., not designated for publication). In *Torres*, two Beaumont Police Officers were traveling back to the station at the end of their shift, when their vehicle collided with Torres's vehicle, killing the passenger officer. *Id.*, at *1–2. The evidence in the record showed that the officers:

> … were still in uniform, they were returning from the county jail and on their way to turn in the police vehicle at the police department in downtown Beaumont, they were on patrol until the police vehicle was turned in, and they would have responded if a call had come in.

Id. at *13. On those facts, the court concluded that the jury could have reasonably concluded that the deceased officer was "in the actual discharge of an official duty." *Id.*

That evidence—that the officers were on-duty, in uniform, returning their patrol vehicle to headquarters before ending their shift, and were fully prepared to exercise any other duty of peace officers enumerated in the code of criminal procedure—is a far cry from the evidence in this case.

Here, the evidence showed that Sgt. Gutierrez was working an "extra job," meaning he was off-duty, being paid by a private company, using his own personal (albeit marked) motorcycle, came to the job from his home, would have returned directly home from the job, and would not have left his job to perform any peace-officer duties had the need arisen.[45] And regardless of whether the officers in *Torres* were on-duty or off, they were not directing traffic. The only thing this case has in common with the facts in *Torres* is that Sgt. Gutierrez was in uniform—which is not enough to prove that he was discharging an "official duty."[46]

1.7.2. No other case construes the same statutory language. The phrase "actual discharge of an official duty" appears in some form in nine other penal statutes besides the intoxication-enhancement statute:

[45] RR4:109–10, 234–36; RR5:239–43; RR6:8–15, 159–60.

[46] RR4:235.

- Tex. Penal Code § 28.03(k)(1): criminal mischief against specific livestock does not apply to "actual discharge of official duties" as a member of the military;

- Tex. Penal Code § 30.05(i): criminal trespass with a handgun does not apply to a peace officer "engaged in the actual discharge of an official duty while carrying the weapon";

- Tex. Penal Code §§ 30.06(f-1), 30.07(g-1): defense to trespass by license holder if, among other things, the person was a first responder "engaged in the actual discharge of the first responder's duties;

- Tex. Penal Code § 31.11(b)(2), (3)(A): affirmative defense to tampering with identification numbers that a peace officer was acting "in the actual discharge of official duties," or that an employee or agent of TxDOT or the DMV was "in the actual discharge of official duties";

- Tex. Penal Code § 37.10(e): affirmative defense to possessing unlawfully obtained governmental record if the possession occurred "in the actual discharge of official duties" as a public servant;

- Tex. Penal Code § 46.03(b), (d), (h): defense to prosecution for specific prohibited weapon offenses if the actor was "in the actual discharge of his official duties" or "in the actual discharge of duties";

- Tex. Penal Code § 46.14(c): offense of firearm smuggling does not apply to a peace officer "who is engaged in the actual discharge of an official duty"; and

- Tex. Penal Code § 46.15(a)(1)–(3), (b)(1), (f), (r): specific weapons offenses do not apply to peace officers regardless of whether the officer "is engaged in the actual discharge of the officer's … duties," nor to other enumerated officers who are "engaged in the actual discharge of the officer's duties," nor to a person "in the actual discharge of official duties" as a member of the military or employee of a penal institution, or to a first responder who, among other things, "was engaged in the actual discharge of the first responder's duties."

All nine define defensive issues, and no case has ever construed the meaning of the phrase "actual discharge of an official duty" as used in any of them.[47]

1.7.3. Capital-murder and assault cases have identified the specific facts giving rise to the officers' specific duties.

Instead, prior cases have considered a different phrase—that an officer was "in the lawful discharge of an official duty"—which appears in some form in several other statutes. *See*, *e.g.*, Tex. Penal Code §§ 19.03(a)(1) (capital murder); 22.01(b)(1) (assault on public servant); 22.01(b-1)(2) (assault on civil-commitment officer);

[47] Few cases even *quote* those words. *See Plummer v. State*, 426 S.W.3d 122, 126 (Tex. App.—Houston [1st Dist.] 2012), *aff'd*, 410 S.W.3d 855 (Tex. Crim. App. 2013) (quoting Tex. Penal Code § 46.15(a)(1)); *State v. Kurth*, 981 S.W.2d 410, 415 n.1 (Tex. App.—San Antonio 1998, no pet.) (quoting Tex. Penal Code § 46.03(b)); *Moosani v. State*, 914 S.W.2d 569, 570 n.2 (Tex. Crim. App. 1995) (Baird, J., dissenting) (quoting former Tex. Penal Code § 46.02(b) (1993), which is now section 46.15(b); *Mitchell v. Purolator Sec., Inc.*, 515 S.W.2d 101, 102 (Tex. 1974) (quoting former Tex. Penal Code § 46.03 (1974), which is now section 46.15).

22.01(b-2) (assault on peace officer or judge); 22.02(b)(2) (aggravated assault on public servant).

Many cases citing these statutes turned on whether evidence was relevant to, or sufficient to prove, the *lawfulness* of the officer's conduct. For example, in *Hughes v. State*, 897 S.W.2d 285, 297–98 (Tex. Crim. App. 1994), the Court of Criminal Appeals held that a capital-murder defendant was not entitled to jury instruction that "an officer is not engaged in the lawful discharge of an official duty if he is engaged in an unconstitutional stop or detention." *Id.* Whether or not a traffic stop is constitutionally reasonable, the Court said, is irrelevant to determining if the officer was acting in the lawful discharge of his duties. *Id.* (citing *Guerra v. State*, 771 S.W.2d 453, 460–61 (Tex. Crim. App. 1988) (validity of arrest irrelevant to whether officer was lawfully discharging duties); *Montoya v. State*, 744 S.W.2d 15, 29–30 (Tex. Crim. App. 1987) (same)); *see also Gonzalez v. State*, 574 S.W.2d 135, 136–37 (Tex. Crim. App. 1978) (in aggravated assault case, an officer attempting to arrest the defendant was in the lawful discharge of a duty even if the arrest was unlawful).

To the extent these cases address merely the lawfulness of the officer's conduct, they are not on point, for the intoxication-enhancement statute does not make "lawful" an element of the enhancement. Tex. Penal Code § 49.09(b-1), (b-2).

Some of these cases, however, also decided whether the evidence was sufficient to prove that the officer was engaged in an "official duty." In each case where the Court found the evidence to be sufficient, however, the Court pointed to evidence that goes beyond what the State produced in this case. Let's look at four of them.

1.7.3.1. On-duty officers were discharging official duties when responding to a report of crime.

Two cases dealt with on-duty officers. *Hughes*, 897 S.W.2d at 298; *Guerra*, 771 S.W.2d at 461. In *Hughes*, the Court found that the officer was "acting within his capacity as a peace officer" because he "was on duty, in uniform[,] and patrolling Interstate 10 with his partner when they heard and responded to the dispatcher's report." *Hughes*, 897 S.W.2d at 298.

In *Guerra*, the Court found that the officer "was clearly engaged in his 'official duty'" when "the uncontradicted evidence" showed that, at the time of the murder, the officer was assigned to K-9 patrol, "was on duty, in uniform, driving a marked patrol car and accompanied by his K-9 partner," and was responding to a citizen's report of a crime. *Guerra*, 771 S.W.2d at 461.

In both of these cases, the officers were not only in unform and on-duty, but they were also actively responding to a reported criminal offense, which is a general duty of peace officers. Tex. Code Crim. Proc. art. 2A.051(2), (5). The evidence in these cases goes

beyond even that in *Torres*, where the officers were simply prepared to respond to any call that came in. *Torres*, 2023 WL 6613129, at *13. By contrast, in this case, the evidence was undisputed that not only was Sgt. Gutierrez off-duty while working his "extra job," but he also would not have left that job to respond to any other call.[48]

1.7.3.2. Off-duty officers were discharging an official duty when the circumstances triggered a specific statutory duty.

Two other cases dealt with off-duty officers. *Cuevas,* 576 S.W.3d at 399–400; *Polk v. State*, 337 S.W.3d 286, at 287–88 (Tex. App.—Eastland 2010, pet. ref'd). In *Cuevas*, as already discussed, the Court identified the specific statutory duty—enforcing the Texas Alcoholic Beverage Code—that the officer was discharging, along with the facts that gave rise to that duty—the defendant's violation of a specific code section. *Cuevas*, 576 S.W.3d at 399–400.

In *Polk*, the court of appeals determined that when an off-duty officer "saw what he believed to be a drug transaction taking place" and "began to investigate that potential criminal activity," "he ceased to be off-duty and assumed the role of a peace officer." *Polk*, 337 S.W.3d at 288. The court therefore identified evidence of the specific facts that gave rise to the officer's statutory duties to interfere

[48] RR6:14, 159–60.

without warrant to prevent or suppress crime. Tex. Code Crim. Proc. art. 2A.051(2).

In neither case was it sufficient merely that the off-duty officer was a peace officer. There were specific facts that triggered the officer's duty to act, from which the Court could find that the officer was discharging an "official duty." Unlike in those cases, the State proved no such facts in this case.

1.8. The proper remedy is reformation of the judgment and a new punishment hearing.

The evidence is therefore insufficient to prove that Sgt. Gutierrez was discharging an "official duty," as required to convict Spry of a first-degree felony.

When the evidence is insufficient to support a conviction for a greater offense but is nevertheless sufficient to support a conviction for a lesser offense, and the jury necessarily found every element of the lesser offense, then the court of appeals is required to reform the judgment to reflect a conviction for the lesser-included offense and to remand the case for a new punishment hearing attendant to the post-reformation conviction. *Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014); *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012).

That is the situation here. Spry candidly does not challenge the sufficiency of the evidence to support her conviction for second-

degree intoxication manslaughter. Tex. Penal Code § 49.08. And the jury, in order to convict her of first-degree intoxication manslaughter of a peace officer, necessarily found all the elements of the lesser offense.[49]

Accordingly, this Court should reform the judgment to reflect a second-degree felony conviction and remand the case for a new punishment hearing within the proper range of punishment. *Bowen*, 374 S.W.3d at 432; Tex. R. App. P. 43.2(b), (d).

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[49] CR:852–53 (application paragraph).

Issue Two

2. Trial counsel was constitutionally ineffective for failing to object to the autopsy report under the Confrontation Clause.

At trial, the testifying medical examiner relied on the autopsy report of another assistant medical examiner who did not testify at trial, but Spry's counsel failed to object to this clear-cut Confrontation violation. Counsel's ineffectiveness is apparent from the record.

2.1. When Dr. Henrie testified that she relied on Dr. Wolf's autopsy report in forming her opinions, counsel objected—but not under the Confrontation Clause.

In this case, assistant medical examiner Dr. Emma Henrie testified that she didn't perform an autopsy on Sgt. Gutierrez.[50] Instead, Dr. Dwayne Wolf performed the autopsy.[51] After Dr. Wolf retired, Dr. Henrie reviewed his autopsy report, photographs, diagrams, x-rays, and testing, and then made her own conclusions.[52]

Spry's trial counsel objected to "this witness testifying about the autopsy report since it's been clearly established Dr. Wolf would be the appropriate witness to get this information out."[53] The trial court overruled the objection.[54]

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[50] RR5:82.

[51] RR5:80–81.

[52] RR5:80, 82.

[53] RR5:83.

[54] RR5:83.

2.2. Dr. Henrie presented numerous facts from Dr. Wolf's autopsy report.

Dr. Henrie had Dr. Wolf's report in front of her[55] and referred to it during her testimony, citing or relying on it in order to testify to:

- Sgt. Gutierrez's:
  - height;[56]
  - weight;[57] and
  - general health "other than the injuries that caused his death";[58]
- That there was "nothing" in the toxicology analysis conducted on Sgt. Gutierrez;[59] and
- That Sgt. Gutierrez had:
  - a subscapular hemorrhage on the left side of his head;[60]
  - subarachnoid and subdural hemorrhages on his head;[61]
  - no other head injuries;[62]
  - no brain injuries;[63]
  - no skull fractures;[64]

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[55] RR5:84–85. The report itself, SX166, was neither offered nor admitted into evidence and is not in the appellate record.

[56] RR5:86

[57] RR5:86.

[58] RR5:86.

[59] RR5:87.

[60] RR5:89.

[61] RR5:89.

[62] RR5:89.

[63] RR5:89.

[64] RR5:89.

- rib fractures;[65]
- lung lacerations;[66]
- blood in his lung cavities;[67]
- a collapsed lung;[68]
- a heart laceration;[69]
- abdominal bruises;[70]
- multiple mesenteric lacerations;[71]
- hemorrhagic pockets in his right middle abdomen;[72]
- stretch lacerations on his hip;[73]
- abrasions and lacerations on his hand;[74] and
- a dislocation of his finger.[75]

From these facts, Dr. Henrie testified that Sgt. Gutierrez's injuries were consistent with an automobile–pedestrian crash, his death was caused by multiple blunt-force injuries, of which the rib fractures were fatal by collapsing his lung and lacerating his heart, and that he would have been conscious while sustaining the injuries.[76]

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[65] RR5:90.

[66] RR5:90.

[67] RR5:90–91.

[68] RR5:94.

[69] RR5:95–96.

[70] RR5:97–98

[71] RR5:98.

[72] RR5:99.

[73] RR5:100.

[74] RR5:102–03.

[75] RR5:103.

[76] RR5:88, 92–97, 99, 101–02.

2.3. An ineffective-assistance claim may be raised on direct appeal when it is "so apparent from the record" that no reasonable strategy would support counsel's failure to act.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

Under this standard, a defendant is entitled to objectively reasonable representation. *Lopez*, 343 S.W.3d at 142. To get a conviction reversed based on ineffective assistance of counsel, an appellant must demonstrate, by a preponderance of the evidence, both:

1) Deficient Performance—that counsel's performance fell below an objective standard of reasonableness; and
2) Prejudice—that but for the deficiency, there is a reasonable probability that the result of the proceeding would have been different.

Id.

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and was motivated by legitimate trial strategy. *Id.* For a court to find counsel ineffective, counsel's deficiency must be affirmatively demonstrated in the record. *Id.* When direct evidence is not available, the court will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined. *Id.* at 143 In most cases on direct

appeal, the record will be too undeveloped for the court to review trial counsel's motives. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

Nevertheless, a claim of ineffective assistance of counsel may be "so apparent from the record" that it can be addressed on direct appeal. *Freeman v. State*, 125 S.W.3d 505, 507 (Tex. Crim. App. 2003) (quoting *Massaro v. United States*, 538 U.S. 500, 508 (2003)). A reviewing court may find counsel's performance to be deficient when counsel's conduct was so outrageous that no competent attorney would have engaged in it. *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013). This usually occurs when "there is no imaginable strategic motivation for trial counsel's failure" to act. *Villa v. State*, 417 S.W.3d 455, 463 (Tex. Crim. App. 2013) (citing *Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992)).

2.4. The Confrontation Clause applies when a testifying expert relies on testimonial facts as a basis for her opinion.

The Sixth Amendment also guarantees criminal defendants the right to cross-examine the witnesses against them. U.S. Const. amend. VI; *Smith v. Arizona*, 602 U.S. 779, 783 (2024).

The Confrontation Clause applies to forensic evidence such as lab reports and "bars the admission at trial of 'testimonial statements' of an absent witness unless she is 'unavailable to testify, and the

defendant ha[s] had a prior opportunity to cross-examine her.'" *Smith*, 602 U.S. at 783 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307, 329 (2009) and quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

In *Smith*, the Supreme Court settled a longstanding question and held that when an expert witness restates an absent witness's factual assertions to support his own opinion testimony, and those statements provide that support only if true, then the statements have come into evidence for their truth. *Id*. at 783, 800–03. If those statements are also testimonial, then the Confrontation Clause is violated. *Id.*

To show that an attorney was ineffective for failing to object based on the Confrontation Clause, an appellant must show, at a minimum, that the trial court would have erred in overruling the objection had it been made. *Vaughan v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996); *see Torres v. State*, 609 S.W.3d 595, 597 (Tex. App.—Houston [14th Dist.] pet. refd) (applying *Vaughan* to Confrontation objections).

2.5. Counsel did not preserve a complaint under the Confrontation Clause.

In this case, counsel's objection was inadequate to preserve a complaint under the Confrontation cause. To preserve an issue for

appeal, an objection to evidence must be specific. Tex. R. App. P. 33.1(a)(1)(A); Tex. R. Evid. 103(a)(1)(B).

Counsel merely objected that "Dr. Wolf would be the appropriate witness."[77] That wasn't specific enough. "When a defendant's objection encompasses complaints under both the Texas Rules of Evidence and the Confrontation Clause, the objection is not sufficiently specific to preserve error." *Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005); *see also Carter v. State*, No. 01-16-00799-CR, 2017 WL 4682187, at *3 (Tex. App.—Houston [1st Dist.] Oct. 19, 2017, pet. ref'd) (mem. op., not designated for publication) (counsel's failure to refer to the Confrontation Clause forfeited issue on appeal).

2.6. Counsel's failure was objectively deficient because the witness's reliance on the autopsy report violated the Confrontation Clause, and the trial court would have erred in overruling the objection.

Counsel's failure to object to Dr. Henrie's testimony under the Confrontation Clause was objectively deficient—indeed, inexcusable—because her reliance on Dr. Wolf's autopsy report violated the Confrontation Clause, and the trial court would have erred in overruling the objection.

[77] RR5:83.

Introduction of a statement at trial violates the Confrontation clause if the statement is 1) offered for its truth, and 2) testimonial, and if 3) the State cannot show that the witness is unavailable and that the defendant had a prior opportunity to cross-examine him. *Smith*, 602 U.S. at 800; *Crawford*, 541 U.S. at 50–60. Dr. Wolf's autopsy report satisfied every prong.

The autopsy report was offered for its truth. Dr. Henrie relied on Dr. Wolf's factual findings regarding Sgt. Gutierrez's health and injuries in order to draw her own conclusions about the cause of his death.[78] She never physically saw Sgt. Gutierrez's body.[79] Her opinions about the cause of death are valid *only if* the statements in Dr. Wolf's autopsy report are true. That is exactly what the Supreme Court held in *Smith* to be required to show that a statement was offered for its truth. *Smith*, 602 U.S. at 792–800 (testifying expert's opinions "were predicated on the truth" of the nontestifying analyst's "factual statements").

The autopsy report was testimonial. Whether a statement is testimonial depends on the principal reason it was made, given all the relevant circumstances. *Id.* at 800–801 (citing *Michigan v. Bryant*, 562 U.S. 344, 369 (2011)). An autopsy report is testimonial if it was made under circumstances that "would lead an objective witness

[78] RR5:84–104.

[79] RR5:105.

reasonably to believe that the statement would be available for use at a later trial." *Lee v. State*, 418 S.W.3d 892, 896 (Tex. App.—Houston [14th Dist.] 2013 pet. ref'd) (quoting *Langham v. State*, 305 S.W.3d 568, 576 (Tex. Crim. App. 2010)). Because medical examiners are required by law to submit an autopsy report to the district attorney, an objective medical examiner would believe that his report would be used in a later prosecution. *Id.* (citing *Wood v. State*, 299 S.W.3d 200, 209 (Tex. App.—Austin 2009, pet. ref'd) (itself citing Tex. Code Crim. Proc. art. 49.25, § 9(a))).

The State could not show that Dr. Wolf was unavailable or that Spry had a prior opportunity for cross-examination. The State made no attempt to show that Dr. Wolf was unavailable to testify. Far from it—the State didn't even try to subpoena him for trial.[80] Instead, the prosecutor merely hinted that he was "somewhere" following his retirement.[81] *See Bullcoming v. New Mexico*, 564 U.S. 647, 659 (2011) (state failed to show that witness was unavailable when the record shows only that the witness "was placed on unpaid leave for an undisclosed reason"). Nor did Spry ever have an opportunity to cross-examine Dr. Wolf. The record

[80] CR:552–53 (subpoenaing every other medical examiner at HCIFS, but not Dr. Wolf).

[81] RR5:81.

reveals no prior court settings at which Dr. Wolf was available to be cross examined.[82] *See id.*

Accordingly, because Dr. Wolf's autopsy report was used for its truth and was testimonial, and the State failed to show unavailability and prior opportunity for cross-examination, Dr. Henrie's testimony violated the Confrontation Clause, and the trial court would have erred in allowing her to testify over a Confrontation objection.

There is therefore no conceivable strategic reason for counsel not to have made a Confrontation objection. There are only two possibilities here. Either counsel didn't know about *Smith*, or counsel knew about *Smith* but chose not to rely on it. Neither is reasonably professional.

Counsel should have been aware of *Smith*: It had been on the books for four months at the time of trial. It wasn't so new that a competent attorney would have missed it, and it wasn't so old that a competent attorney would have forgotten it. Any reasonably competent attorney handling a case involving a retired (and therefore potentially absent) medical examiner would have kept up with this development in the law, known that Dr. Henrie's testimony based on the report was inadmissible, and objected to it.

[82] CR:912–23 (docket showing court settings).

And if counsel did, in fact, know about *Smith*, there is no strategic reason not to have used it in this case. Any reasonably competent attorney would have known that there was nothing to lose and everything to gain by making a Confrontation objection because the court should have sustained the objection. Had the court done so, the State would have had no evidence of causation—an element of the offense. Tex. Penal Code § 49.08(a). Had the court overruled the objection, counsel would have preserved a *constitutional* error for appeal. Tex. R. App. P. 44.2(a). In contrast, by not objecting, counsel allowed the State to prove causation *and* deprived Spry of appellate review of the constitutional violation.

2.7. Counsel's failure to make a Confrontation objection prejudiced Spry.

Had counsel made a Confrontation objection, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686; *Lopez*, 343 S.W.3d at 142. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

A Confrontation objection to Dr. Henrie's testimony would have led to one of two outcomes. First, the court would have sustained the objection and not allowed Dr. Henrie to testify to any opinion that was based on Dr. Wolf's autopsy report, leaving the State without any admissible testimony as to the causation element of the offense.

Tex. Penal Code § 49.08(a). That would have entitled Spry to an acquittal, either by the jury or by this Court.

Second, the court could have overruled the Confrontation objection and allowed Dr. Henrie to testify anyway. That would have preserved the issue for appeal. Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a); *Reyna*, 168 S.W.3d at 179. Because the error is constitutional, this Court would be required to reverse Spry's conviction unless it determined beyond a reasonable doubt that the error did not contribute to the conviction. Tex. R. App. P. 44.2(a); *Davis v. State*, 203 S.W.3d 845, 849 (Tex. Crim. App. 2006).

This Court would have found such harm in this case. To determine harm for violations of the Confrontation Clause, this Court considers several factors:

1) How important the out-of-court statement was to the State's case;
2) Whether the out-of-court statement was cumulative of other evidence;
3) The presence or absence of evidence corroborating or contradicting the out-of-court statement on material points; and
4) The overall strength of the prosecution's case.

Harris v. State, No. 01-23-00549-CR, 2025 WL 994036, at *4 (Tex. App.—Houston [1st Dist.] Apr. 2, 2025, no pet. h.) (mem. op., not designated for publication) (citing *Gutierrez v. State*, 516 S.W.3d 593, 599 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd)).

Dr. Wolf's autopsy report was very important to the State's case—it was the basis of Dr. Henrie's expert opinion as to the cause of death. It was not merely cumulative of Dr. Henrie's independent review of the autopsy, but was in fact the *source* of her "independent review." No other evidence in the record corroborated the key facts that Dr. Henrie relayed—that Sgt. Gutierrez's rib fractures punctured his lung and heart. And while the prosecution's case that Spry struck Sgt. Gutierrez was strong, Dr. Henrie's testimony was the only expert evidence of the cause of his death—an essential element that the State had to prove beyond a reasonable doubt. Tex. Penal Code § 49.08(a).

Thus, regardless of how the trial court had ruled on the objection, there is a reasonable probability that, had counsel *made* a Confrontation objection, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686; *Lopez*, 343 S.W.3d at 142. This Court should find that counsel was ineffective for failing to protect Spry's Confrontation right, and it should reverse her conviction and remand for a new trial in which that right is scrupulously honored. Tex. R. App. P. 43.2(d).

Issues Three & Four
(Judgment & Bill of Costs)

There are errors in the judgment and the bill of costs. This Court should fix them.

Authority to Correct Judgment and Bill of Costs

This Court has the authority to modify a trial court's judgment to make the record speak the truth when it has the necessary information to do so. Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992). A defendant may challenge the costs imposed in a bill of costs for the first time on appeal when the costs are not imposed in open court and the judgment does not contain an itemization of the costs. *London v. State*, 490 S.W.3d 503, 507 (Tex. Crim. App. 2016).

This Court may modify a bill of costs on appeal because the bill of costs obligates an appellant to pay the items listed. *Jones v. State*, 691 S.W.3d 671, 679 (Tex. App.—Houston [14th Dist.] 2024, pet. ref'd). A court of appeals may modify the bill of costs independent of the trial court's judgment. *Pruitt v. State*, 646 S.W.3d 879, 883 (Tex. App.—Amarillo 2022, no pet.); *Bryant v. State*, 642 S.W.3d 847, 850 (Tex. App.—Waco 2021, no pet.); *Dority v. State*, 631 S.W.3d 779, 794 (Tex. App.—Eastland 2021, no pet.); *Contreras v. State*, Nos. 05-20-00185-CR, 05-20-00186-CR, 2021 WL 6071640, at *8 (Tex.

App.—Dallas Dec. 23, 2021, no pet.) (mem. op., not designated for publication); *see also* Tex. R. App. P. 43.6 (a court of appeals "may make any … appropriate order that the law and the nature of the case require").

3. This Court should modify the judgment to correct five errors.

3.1. This Court should modify the judgment to reflect the statute for the offense.

The judgment doesn't list the statute for the offense. It contains a space labelled "Statute for Offense:," but that space is blank.[83]

The Code of Criminal Procedure does not specifically require a judgment to state the statute for the offense. Instead, it requires the Office of Court Administration to promulgate a standardized felony judgment form, and it requires courts to use that form. Tex. Code Crim. Proc. art. 42.01, § 4. The standardized felony judgment form promulgated by OCA contains a field for the "Statute for Offense."[84]

Accordingly, a court must include the statute for the offense on the judgment. Because the court did not, this Court should modify the judgment to add "Tex. Penal Code § 49.08" under the statute heading. Tex. R. App. P. 43.2(b).

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[83] CR:876.

[84] Office of Court Administration, *Rules & Forms—Standardized Felony Judgment Forms*, "Judgment of Conviction by Jury" & "Instructions for Felony Judgment Forms," online at https://www.txcourts.gov/forms/ (last visited April 8, 2025).

3.2. This Court should modify the judgment to delete the $100 EMS fine because that fine was not pronounced in open court.

The judgment lists $10,100 in fines, and it states that the fines include 1) the "General Fine" of $10,000 that the jury imposed and 2) a statutory "EMS Trauma Fine."[85] *See* Tex. Code Crim. Proc. art. 102.0185(a). The judgment should not have imposed the $100 fine because the court did not pronounce that fine in Spry's presence.

A fine is punitive in nature and is intended to be part of the defendant's sentence. *Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016, pet. dism'd) (citing *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011)); *see also Gourley v. State*, __ S.W.3d __, 2025 WL 421228, at *8 (Tex. App.—Fort Worth Feb 6, 2025, no pet.) (same). The code of criminal procedure requires the sentence to be pronounced in the defendant's presence. Tex. Code Crim. Proc. art. 42.03, § 1(a). When there is a conflict between the oral pronouncement of sentence and the written judgment, the oral pronouncement controls. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004).

Here, while the judgment imposes the $100 EMS fine, the trial court did not orally pronounce the $100 fine at sentencing.[86] The court's oral pronouncement controls, and this Court should modify

[85] CR:876–77.

[86] RR10:4.

the judgment to delete the $100 fine. *See Gourley*, 2025 WL 421228, at *8 (deleting unpronounced $100 EMS fine and citing, among others, *Armstrong*, 340 S.W.3d at 767; *Taylor*, 131 S.W.3d at 500). Tex. R. App. P. 43.2(b).

3.3. This Court should delete $5 from the arrest fees.

The judgment assesses $1,135 in reimbursement fees, which—according to the bill of costs—includes $15 for "Arrest w/out Capias."[87] This is error because the record supports an assessment of only $10 in warrantless-arrest fees.

A court is authorized to assess a $5 reimbursement fee for "making an arrest without a warrant" "to defray the costs of services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(1). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[88]

The record shows that Spry was arrested on January 24, 2022, and again in July 2022 after the State filed a motion to revoke her bond.[89] It does not show another arrest.[90] Because the record shows

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[87] CR:876, 879.

[88] The Old Code of Criminal Procedure, being less apt to mince words than the 1965 revision, called such a practice what it is: "Extortion." *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

[89] RR4:203; RR6:195; SX217, 220.

[90] The record shows that the court revoked Spry's bail a second time *in another case*, but not this one. CR:225, 226; RR9:56.

only two warrantless arrests in this case, the record supports the assessment of only $10 in arrest fees. This Court should delete the $5 over-assessment. Tex. R. App. P. 43.2(b).

3.4. This Court should delete $5 from the release fees.

The assessed reimbursement fees also include $15 for "Release Fee."[91] This is error because the record supports an assessment of only $10 in release fees.

A court is authorized to assess a $5 reimbursement fee for "commitment or release" "to defray the costs of services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(6). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[92]

The record shows that Spry was released on bond twice.[93] Thus, the record supports an assessment of only $10 for release.

3.4.1. *Williams* says otherwise.

This Court has previously said that the release fee may also be assessed if a defendant is sentenced to prison. *Williams*, 495 S.W.3d at 591–92. That is because, this Court said, the defendant is

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[91] CR:876, 879.

[92] It would be "Extortion" to do so. *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

[93] SX209, 221.

"released" from the custody of the local Sheriff "into the possession of the prison system." *Id.*

3.4.2. But *Williams* is flawed.

While this Court should ordinarily adhere to its own precedent, *stare decisis* is not an inexorable command. *Ex parte Thomas*, 623 S.W.3d 370, 381 (Tex. Crim. App. 2021) (citing *Paulson v. State*, 28 S.W.3d 570, 571– 72 (Tex. Crim. App. 2000)). A court should not slavishly follow bad law; it is free to reconsider its own precedent if the decision was flawed from the outset. *Id.* (citing *Ex parte Lewis*, 219 S.W.3d 335, 338 (Tex. Crim. App. 2007)).

This Court's holding in *Williams* is just the kind of flawed precedent that should be reconsidered. "Release" is a transitive verb that means "to set free from restraint, confinement, or servitude." *Release*, Merriam-Webster's Collegiate Dictionary (11th ed. 2020).

Moving someone from jail to prison is a lot of things—taking, transferring, delivering—but it's not releasing. A prisoner who is transferred directly from a jail to "the possession of the prison system" is no more "released" than is a fish that is transferred directly from a livewell to a cutting board.[94]

[94] Similarly, one wonders whether the 1993 film "Free Willy" would have been a box-office smash if Willy had been "released" from Northwest Adventure Park to the Portland Aquarium rather than to the Pacific Ocean.

3.4.3. And *Williams* is distinguishable.

Regardless, *Williams* is distinguishable from the record in this case. In *Williams*, this Court stated that the trial court's judgments "ordered the Harris County Sheriff 'to take, safely escort, and deliver Defendant to the Director, Institutional Division, TDCJ." *Williams*, 495 S.W.3d at 592. A sheriff is a peace officer. Tex. Code Crim. Proc. art. 2A.001(1). Thus, even if transferring a person to prison is "releasing" them, the record in *Williams* showed that the service was performed by a peace officer, as required for the release fee to be assessed. Tex. Code Crim. Proc. art. 102.011(a)(6).

In this case, by contrast, the judgment orders an "authorized agent" of *either* "the State of Texas" *or* "the County Sheriff" to transfer Spry to prison.[95] The record doesn't say who this "authorized agent" is or whether they are a peace officer. Assuming that Spry was held in the Harris County Jail before being sent to prison, the law is clear that county jailers are not peace officers. Tex. Code Crim. Proc. art. 2A.066. Thus, unlike in *Williams*, the record here does not show that Spry was released "by a peace officer," as required by Tex. Code Crim. Proc. art. 102.011(a)(6).

[95] CR:877 ("The Court ORDERS the authorized agent of the State of Texas or the County Sheriff to take and deliver Defendant to the Director of the Correctional Institutions Division, TDCJ, for placement in confinement in accordance with this judgment.").

Because the record shows that Spry was released by a peace officer only twice, the record supports the assessment of only $10 in release fees. This Court should delete the $5 over-assessment from the judgment. Tex. R. App. P. 43.2(b).

3.5. This Court should delete $865 from the witness-summoning fees because only 40 subpoenas, rather than 213, were validly served by a peace officer.

The bulk of the $1,135 in reimbursement fees comprises $1,065 assessed as "LEA - Summon Witness." This is error because the record supports an assessment of only $200 in witness-summoning fees.

3.5.1. A court may impose a witness-summoning fee only for a subpoena that was validly served by a peace officer.

A court is authorized to assess a $5 reimbursement fee "for summoning a witness" "to defray the cost of the services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(3). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[96]

The Court of Criminal Appeals has held that the witness-summoning fee is constitutional only because it serves a legitimate purpose of reimbursing "the expenses … *actually incurred by peace*

[96] The "Extortion" continues. *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

officers in serving process on witnesses needed for the defendant's proceedings." *Allen v. State*, 614 S.W.3d 736, 745 (Tex. Crim. App. 2019) (emphasis added).

When nothing in the record demonstrates that a peace officer served a subpoena on a witness or conveyed or attached a witness, there is no basis for assessing fees related to summoning, attaching, or conveying witnesses. *Rhodes v. State*, 676 S.W.3d 228, 233 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (striking fees for "attach/convey witness" where there was no evidence that a peace officer served a subpoena on any witness or conveyed or attached any witness); *Robles v. State*, No. 01-16-00199-CR, 2018 WL 1056482, at *6 (Tex. App.—Houston [1st Dist.] Feb. 27, 2018, pet. ref'd) (mem. op., not designated for publication) (striking $10 of $25 witness fee when record showed that two of five subpoenas were never served); *see also Wilson v. State*, Nos. 05-22-00452-CR, 05-22-00453-CR, 2023 WL 4758470, at *2 (Tex. App.—Dallas July 26, 2023, pet. ref'd) (mem. op., not designated for publication) (striking witness-service fees for two witnesses when the record showed that neither witness was summoned).

Thus, for a court to assess a $5 witness-summoning fee, the record must show two things: 1) valid service of a subpoena 2) by a peace officer.

3.5.1.1. Service of a subpoena must be in accordance with the statute to be valid.

A criminal subpoena "may summon one or more persons to appear" in court to testify or to bring specified evidence "on a specified day." Tex. Code Crim. Proc. art. 24.01(a), 24.02.

By statute, a criminal subpoena is served in one of four ways:

> 1) reading the subpoena in the hearing of the witness;
> 2) delivering a copy of the subpoena to the witness;
> 3) electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address of the witness; or
> 4) mailing a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness unless [two exceptions apply].

Tex. Code Crim. Proc. art. 24.04(a).

The return of the subpoena must show either: 1) the time and manner of service, if read or delivered to the witness; 2) the acknowledgment of receipt, if emailed; 3) the return receipt, if sent by certified mail; or 4) the cause of failure to serve, if the subpoena is not served. *Id.* art. 24.04(b).

Service not made in accordance with the statute is invalid. *Ex parte Terrell*, 95 S.W. 536, 537–38 (Tex. Crim. App. 1906) (applying 1895 Vernon's Code of Criminal Procedure art. 515, which is the direct predecessor of the modern art. 24.04); *see also Fuller v. State*, No. 14-94-00064-CR, 1996 WL 11176, at *1–2 (Tex. App.—Houston

[14th Dist.] Jan. 11, 1996, no pet.) (not designated for publication) (witness was not validly served, to authorize a writ of attachment, when the record did not show compliance with the statutory methods of service).

3.5.1.2. People other than peace officers are authorized to serve subpoenas.

Even if a subpoena is validly served, it cannot merely be assumed that a *peace officer* served the subpoena. The subpoena may name a person "to summon the person whose appearance is sought." *Id.* art. 24.01(b). That person must be either 1) a peace officer, or 2) at least 18 years old and, at the time the subpoena is issued, not a participant in the proceeding for which the appearance is sought.[97] *Id.* Accordingly, a subpoena may be served by someone who is not a peace officer, so long as they otherwise qualify under the statute. *See* Tex. Att'y Gen. Op. No. KP-0207 (2018).

[97] Until 1981, only a peace officer could serve criminal subpoenas. Back then, a criminal subpoena was "a writ issued to the sheriff or other proper officer commanding him to summon one or more persons … to testify," and therefore it could be served only by a peace officer. *See* Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, art. 24.01, 1965 Tex. Gen. Laws 317, 416 (amended 1981); *see also* 1925 Vernon's Code of Criminal Procedure art. 461. The legislature changed this in 1981 to allow service of subpoenas by any qualified individual. *See* Act of May 15, 1981, 67th Leg., R.S., ch. 209, § 1, art. 24.01, 1981 Tex. Gen. Laws 503, 503 (codified at Tex. Code Crim. Proc. art. 24.01).

3.5.2. The record shows that only 40 subpoenas were validly served by a peace officer.

Here, the bill of costs shows that the court assessed $1,065 for summoning witnesses, which, at $5 per subpoena, equates to 213 subpoenas.[98] The record is far from simple, however, and it ultimately shows that only 40 subpoenas were validly served by a peace officer.

The record contains 237 subpoenas.[99] It contains applications for all 237.[100] Of those 237 subpoenas, however, 24 have no return showing whether or not they were served.[101] There are also 78 returns that are duplicates of other returns[102] and 7 more returns that merely confirm execution of the same subpoena as another return.[103]

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[98] CR:879.

[99] CR:40–41, 47, 54, 58, 61, 67, 72, 76, 98, 109, 113–14, 121, 167, 172, 178, 192, 196, 206, 216–307, 442, 446–47, 453, 457–61, 477, 480–82, 526, 531, 554–646, 759, 762–64, 771–74, 784–88, 803, 807–08, 814.

[100] CR:35, 45, 52, 57, 59, 65, 70, 74, 96, 108, 110, 120, 165, 171, 176, 191, 195, 204, 209–15, 441, 445, 452, 456, 476, 479, 524, 529, 547–53, 758, 761, 770, 783, 802, 806, 813

[101] CR:58, 98, 109, 113–14, 121, 252, 255, 260, 270, 286, 291, 296, 301, 303–04, 560, 576, 585, 604, 609, 611, 617, 624.

[102] CR:43, 175, 181–82, 318–25, 380–416, 444, 449–50, 455, 467–70, 534–36, 684–88, 695–96, 715–17, 793–800.

[103] CR:342, 68, 711, 736, 705–06, 753.

That leaves 213 subpoenas[104] that have 213 unique returns.[105] Of these 213 subpoenas, the returns show that only 40 were validly served by a peace officer. To see why, its simplest to identify the returns that were *not* validly served by a peace officer. These break down into three categories: 1) subpoenas that were not executed at all; 2) subpoenas that were not executed by a peace officer; and 3) subpoenas that were executed by a peace officer but were not validly served.

3.5.2.1. The 21 "Un-Executed" subpoena returns do not support a witness-summoning fee.

21 subpoenas[106] were returned "Un-Executed."[107] Each return is explicit that there was no service.[108] These returns are like the one quoted in *Wilson*—where one return said that the subpoena was

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[104] CR:40–41, 47, 54, 61, 67, 72, 76, 167, 172, 178, 192, 196, 206, 216–307, 442, 446–47, 458–61, 477, 480–82, 526, 531, 554–59, 561–75, 577–84, 586–603, 605–08, 610, 612–16, 618–23, 625–46, 759, 762–64, 771–74, 784–88, 803, 807–08, 814.

[105] CR:42, 44, 48, 55, 62, 68, 73, 77, 169, 174, 180, 194, 198, 208, 308–17, 326–27, 329–34, 336–41, 343–79, 417–28, 430–32, 434–40, 443, 448–49, 454, 462–66, 478, 483–85, 528, 533, 647–53, 655–56, 658–79, 681–83, 689, 691–94, 697, 699–701, 703–04, 707–10, 712–14, 718–35, 738–43, 745, 747–48, 750–52, 755–57, 760, 765–66, 768, 775, 777, 779, 781, 789–92, 801, 804, 809, 811, 815.

[106] CR:236, 240, 243, 266, 272, 275, 283, 288, 289, 292, 294, 458, 554–55, 568, 571, 591, 606, 610, 628, 640.

[107] CR:308–11, 316–17, 334, 417–18, 421, 439, 462, 647–48, 677, 697, 699, 701, 736, 750, 756.

[108] *Id.*

"cancelled," and the other one said the witness was not served because of a "bad" address. *Wilson*, 2023 WL 4758470, at *2. They show that no witness on any of these subpoenas was served or summoned.[109]

"It follows," as the court said in *Wilson*, "that if the witnesses were not summoned, the service being charged for was not performed." *Id.* Thus, no expenses were actually incurred, and the 21 "Un-Executed" subpoenas cannot be the basis of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson,* 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

3.5.2.2. The 37 "Executed" subpoenas that were served by a District Attorney do not support a witness-summoning fee.

Meanwhile, 37 subpoenas[110] have returns showing that they were served by a "District Attorney" rather than a peace officer.[111]

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[109] Two of the 7 "other" returns mentioned above purport to show execution of two of these subpoenas. CR:342, 680. The first, however, shows that the subpoena was faxed, while the second shows that it was emailed to someone other than the witness—neither of which is valid service, as explained below.

[110] CR:54, 167, 246–47, 253, 256, 262, 280, 284, 287, 293, 297, 300, 302, 305–06, 477, 480–82, 566, 578, 581, 602, 607, 615, 619–20, 623, 627, 638–39, 644, 762–64, 803.

[111] CR:55, 169, 419, 424–25, 427–28, 430–32, 434–38, 440, 478, 483–85, 653, 656, 658, 689, 709, 739–43, 745, 747, 748, 765–66, 768, 804.

A District Attorney is not a peace officer. *See* Tex. Code Crim. Proc. art. 2A.001 ("Peace Officers Generally"). A District Attorney's *investigator* is a peace officer. *Id.* art. 2A.001(5). But none of the 37 returns states that it was served by an investigator.[112]

Because these 37 subpoenas were not served by a peace officer, they cannot form the basis of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson,* 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6; Tex. Code Crim. Proc. art. 24.01(b).

3.5.2.3. 115 of the subpoenas served by a peace officer were not validly served do not support a witness-summoning fee.

The remaining 155 subpoenas[113] have returns that say they were served by a peace officer.[114] But 115 of those returns do not show

[112] *Id.* Indeed, none of the "District Attorney" returns contains the signature or printed name of the person who executed it.

[113] CR:40–41, 47, 61, 67, 72, 76, 172, 178, 192, 196, 206, 216–35, 237–39, 241–42, 244–45, 248–51, 254, 257–59, 261, 263–65, 267–69, 217, 273–74, 276–79, 281–83, 285, 290, 295, 298–99, 307, 442, 446–47, 453, 457, 459–61, 526, 531, 556–59, 561–65, 567, 569, 570, 572–75, 577, 579–80, 582–84, 586–90, 592–601, 603, 605, 608, 612–14, 616, 618, 621, 622, 625–26, 628–37, 641–43, 645–46, 759, 771–74, 784–88, 807–08, 814.

[114] CR:42, 44, 48, 62, 68, 73, 77, 174, 180, 194, 198, 208, 312–15, 326, 327, 329, 330–33, 336–41, 343–79, 420, 422–23, 426, 443, 448–49, 454, 463–66, 528, 533, 649–52, 655, 659, 660–79, 681–83, 691–94, 700, 703–04, 707–08, 710, 712–14, 718–35, 738, 751–52, 755, 757, 760, 775, 777, 779, 781, 789, 790–92, 801, 809, 811, 815.

valid service under any of the four statutory methods. *See* Tex. Code Crim. Proc. art. 24.04(a). These break down into several groups:

6: Of the eight returns stating that **"personal service"** was completed,[115] five state that someone other than the witness was served,[116] and one more states that service was "via the doorbell camera"—whatever that means.[117] Those six returns do not show that the subpoenas were personally served on the witness, and thus only two of these eight returns support a witness-summoning fee.

10: Ten returns state that the subpoenas were **"delivered"** to the "HPD liaison."[118] None show proper service. Delivery of a subpoena under art. 24.04(a)(2) requires "personal delivery." *Hedgecock v. State*, No. 05-07-01315-CR, 2008 WL 4756990, at *4–5 (Tex. App.—Dallas Oct. 31, 2008, no pet.) (mem. op., not designated for publication) (determining that "delivery" of out-of-county subpoena under Tex. Code Crim. Proc. art. 24.17 is the same as "delivery" of an in-county subpoena under art. 24.04(a)(2), and concluding that when a witness "was not served via personal delivery," the witness "was not properly served"). Delivery to an unnamed "HPD Liaison,"

[115] CR:420, 422–23, 426, 751–52, 755, 757.

[116] CR:420 (brother), 426 (mother), 751 (mom), 752 (mom), 755 (clerk).

[117] CR:757.

[118] 312–15, 443, 649–52, 760.

rather than to the witness, is not personal delivery, so none of these returns support a witness-summoning fee.

3: Three returns state that they were served by **"fax."**[119] Fax is not a valid method of service for a criminal subpoena. Tex. Code Crim. Proc. art. 24.04(a). None of these subpoenas support a witness-summoning fee.

96: 120 returns state that the subpoena was served via **"email"** in some way.[120] Email *can* be a valid method of service, if the subpoena is electronically transmitted, "acknowledgment of receipt requested, to the last known electronic address of the witness." Tex. Code Crim. Proc. art. 24.04(a)(3). But 96 of these returns do not show valid service.

38 of the "email" returns show that they were emailed to someone *other* than the witness—

- 22 delivered to "(IFS) Subpoenas"[121]
- 11 delivered to "Claudia Marines"[122]
- 2 received by "Pasadena Texas Police Department"[123]

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[119] CR:707–08, 710.

[120] 42, 44, 48, 77, 174, 180, 208, 326–27, 329–33, 336–41, 343–79, 463–66, 533, 655, 659–79, 681–83, 691–94, 700, 703–04, 712–14, 718–35, 738, 789–92, 801.

[121] CR:329–33, 659–75.

[122] CR:336–41, 678–79, 681–83.

[123] CR326, 655.

- 1 received by “Martha Jones - Clerk”[124]
- 1 delivered to “Sharon ONeal”[125]
- 1 received by “CIB liaison”[126]

—which is not sufficient electronic service under the statute. Tex. Code Crim. Proc. art. 24.04(a)(3).

1 “email” return shows that the subpoena was actually faxed[127]—which is not a valid method of service. Tex. Code Crim. Proc. art. 24.04(a).

And of the 78 returns that say the subpoena was emailed to the witness, 57 do not show an electronic address for the witness on the application,[128] subpoena,[129] or return.[130] Accordingly, these returns do not show valid electronic service under the statute, either. Tex. Code Crim. Proc. art. 24.04(a)(3).

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[124] CR:327.

[125] CR:676.

[126] CR:703.

[127] CR:208.

[128] CR:35, 209–15, 456, 547–50, 552, 783.

[129] CR:41, 216-18, 225–26, 228, 231, 233–34, 238–39, 241, 244, 248–49, 251, 254, 257, 259, 263–65, 267–68, 273–74, 276, 278–79, 281, 307, 459, 558–59, 562, 564–65, 567, 569, 575, 579–80, 586, 589–90, 594–98, 605, 616, 621–22, 626, 784.

[130] CR:42, 344, 346–53, 355, 358–64, 366–79, 464, 691–94, 713, 718–35, 801. One return (CR:683) has an alternate return that confirms the email was not received by the witness. CR:736. Another (CR:694) has an alternate version that says it was faxed. CR:11. Once again, fax is not valid service.

3.5.2.4. Only 40 subpoenas support a witness-summoning fee. Thus, of the 213 subpoenas with returns in the record, 21 were "Un-Executed," 37 were served by a "District Attorney," and 115 served by a peace officer were not validly served. That leaves 40.[131] And indeed, only 40 returns appear to show valid service by a peace officer.[132]

At $5 per subpoena, these 40 returns support a total witness-summoning fee of $200—$865 less than the court assessed in the judgment. Tex. Code Crim. Proc. art. 102.011(a)(3). This Court should modify the judgment to remove this $865 over-assessment.[133] Tex. R. App. P. 43.2(b).

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[131] 213 – 21 – 37 – (6 + 10 + 3 + 38 + 1 + 57) = 40.

[132] CR:44, 48, 62, 68, 73, 77, 174, 180, 194, 198, 345, 354, 356–57, 365, 422–23, 448, 449, 454, 463, 465–66, 528, 533, 700, 704, 712, 714, 738, 775, 777, 779, 781, 789–92, 809, 811, 815.

[133] In a recent published opinion, the Fourteenth Court of Appeals remanded the case to the trial court for "recalculation of the reimbursement fee" when the record—which contained 60 emailed subpoenas—did not support the assessment of $2,835 for an "attach/convey witness" fee. *Ikemere v. State*, No. 14-23-00285-CR, __ S.W.3d __, 2025 WL 1033959, at *4–6 (Tex. App.—Houston [14th Dist.] Apr. 8, 2025, no pet. h.). Unlike that case, remand is not necessary here because the record contains the subpoenas and returns, which allow this Court to determine which subpoenas support the specific assessment of the witness-summoning fee and to conclude that there are no other "likely costs that should have been assessed" but weren't. *Id.* at *5.

4. This Court should modify the bill of costs to remove improperly included items.

There are five errors in the bill of costs, in two groups. First, the bill improperly includes two fines. Second, the bill includes improperly assessed reimbursement fees in three categories.

4.1. This Court should delete the fines from the bill.

The bill includes the $10,000 general fine and the $100 EMS fine.[134] Neither should be in the bill. The EMS fine was not orally pronounced and should be removed for that reason alone. *Gourley*, 2025 WL 421228, at *8 (citing, among others, *Armstrong*, 340 S.W.3d at 767; *Taylor*, 131 S.W.3d at 500).

Additionally, neither fine should be in the bill regardless of whether it was orally pronounced. Fines are punitive and part of the sentence; they are not costs and should not be included in the bill of costs. *Williams*, 495 S.W.3d at 590–91. This Court should delete the fines from the bill. *Id.*; Tex. R. App. P. 43.2(b), 43.6.

4.2. This Court should remove improperly assessed reimbursement fees from the bill.

Every improperly assessed reimbursement fee (arrest, release, and witness-summoning) that was included in the judgment is also itemized in the bill of costs.[135] Just as this Court should modify the

[134] CR:879.

[135] CR:876, 879.

assessment in the judgment to delete the improperly assessed fees, it should modify the bill to delete the same. *Pruitt*, 646 S.W.3d at 883; *Dority*, 631 S.W.3d at 794; *Bryant*, 642 S.W.3d at 850; *Contreras*, 2021 WL 6071640, at *7–8; Tex. R. App. P. 43.2(b), 43.6.

4.3. Conclusion: Summary of All Bill Modifications

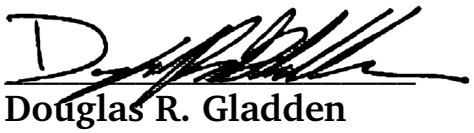
Putting all of this together, this Court should modify the bill of costs as follows:

Fee Description	**Amount Assessed**
~~Fine~~	~~$10,000.00~~
LEA - Summon Witness	~~$1,065.00~~ 200.00
Consolidated Court Cost -State	$185.00
Consolidated Court Cost -Local	$105.00
~~EMS Trauma Fine~~	~~$100.00~~
LEA - Bond Approval Fee	$20.00
LEA - Arrest w/out Capias	~~$15.00~~ 10.00
LEA - Commitment Fee	$15.00
LEA - Release Fee	~~$15.00~~ 10.00
LEA - Summon Jury	$5.00
Assessed Date: 10/26/2024	**Total Amount Assessed: ~~$11,525.00~~ 550.00**
	Total Paid: $0.00
	Total Due: ~~$11,525.00~~ 550.00

Prayer

Spry prays that this Honorable Court reverse the trial court's judgments and remand for a new trial with effective counsel, or for a new punishment hearing within the correct range of punishment, and that this Court modify the judgment and bill of costs to speak the truth.

Respectfully submitted,



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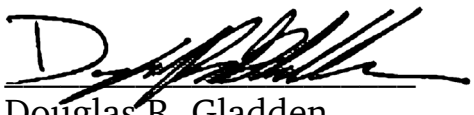

Douglas R. Gladden

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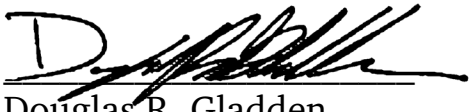

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