No. 14-24-00399-CR

In The Court of Appeals
For the 14th District of Texas

Abram Silva,
Appellant

v.

The State of Texas,
Appellee

On Appeal from Cause Number 1795956
From the 185th District Court of Harris County, Texas

Brief for Appellant

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument will significantly aid this Court because this case presents important issues concerning Texas courts' treatment of wholly deficient Motions to Adjudicate.

STATEMENT OF THE CASE

This is an appeal from an adjudication of guilt based upon the felony offense of violating bond conditions two or more times within twelve months. *See* Tex. Penal Code Ann. §25.072. Mr. Silva pled guilty on April 4, 2023, and received two years deferred adjudication. C.R. 54. The state filed a motion to adjudicate on November 3, 2023, and an amended motion to adjudicate on December 7, 2023. (C.R. 148). A hearing was held on May 23, 2024 and after the presentation of evidence and argument of counsel, the trial court adjudicated Mr. Silva's guilt because he "commit[ed] an offense against the State of Texas on or about 9/25/2023 and 9/23/2023." (C.R. 90). The trial court sentenced Mr. Silva to eight years imprisonment. Timely notice of appeal was filed on May 28, 2024.

ISSUES PRESENTED

1. The State's Motion to Adjudicate alleged two new law violations described only using abbreviated references to possible criminal offenses, no full offense names, elements, or statutory manner or means of commission; did these mere abbreviations provide Mr. Silva with sufficient notice to prepare a defense, and did the trial court err by

allowing Mr. Silva's hearing to continue without requiring adequate notice from the State?

2. The State's allegation-by-abbreviation also omitted any case-specific facts such as the names of the complainants or identity of any property alleged to have been damaged, did the trial court err by denying Mr. Silva's pre-hearing request for this essential information in his Motion to Quash?

STATEMENT OF FACTS

The trial court proceeded in a hearing on the State's Amended Motion to adjudicate guilt filed December 7, 2023.[1] The first two allegations in the state's motion claimed that Mr. Silva had committed offenses contrary to the terms and conditions of community supervision (C.R. 106). These allegations included only dates and abbreviations of two alleged offenses without further elaboration or detail:

1. The State would further show the said Defendant did then and there violate terms and conditions of Community Supervision by: Committing an offense against the State of Texas. To wit: on or about September 25, 2023, in Harris County, State of Texas, Abram Silva, hereafter styled the Defendant, did then and there unlawfully commit the criminal offense of CRIM MISCHIEF > 100<$750.

[1] The only copy of the Amended Motion to Adjudicate that appears in the Clerk's record is one that was originally file stamped December 7, 2023, and signed on December 7 (C.R. 108); however, this copy contains handwritten annotations from the day of the hearing on the Motion and is hand-stamped "FILED" on May 23, 2024. The Clerk's record contains other reference to the December 7 Amended Motion in the Precept to Serve (C.R. 73), the court's docket sheet (C.R. 147), and in Mr. Silva's Motion to Quash (C.R. 101). Neither the annotations nor the hand-stamped file stamp from May 23, 2024 alters or obscures the original language or the original file date of the State's December 7, 2023 Amended Motion.

1. [sic.] The State would further show the said Defendant did then and there violate terms and conditions of Community Supervision by: Committing an offense against the State of Texas. To wit: on or about September 23, 2023, in Harris County, State of Texas, Abram Silva, hereafter styled the Defendant, did then and there unlawfully commit the criminal offense of BURG W-INTENT-COMMIT OTHER FELON.

Mr. Silva's Motion to Quash

Mr. Silva filed a Motion to Quash the State's Motion to Adjudicate Guilt before the hearing commenced (C.R. 101-103). In his Motion, he complained that he did not have sufficient notice to allow him to prepare his defense because the State's Motion to Adjudicate failed to allege necessary information to meet due process requirements of the 6th and 14th Amendments to the U.S. Constitution. *Id.* Mr. Silva's counsel provided the trial court with caselaw from *Garner v. State*, 545 S.W. 2d 178 (Tex. Crim. App. 1977) (C.R. 102). Mr. Silva further complained that the allegations in paragraph 1 and the second paragraph 1 failed to allege the manner and means by which the violations were alleged to have been committed, failed to name the other felony underlying the alleged burglary offense, and failed to include the complainant's names, case numbers, or courts related to the alleged violations. *Id.*

The trial court's consideration of Mr. Silva's motion to quash takes up less than half of a page of the Reporter's record (R.R. 10). When counsel discussed this motion with the trial judge, he brought his complaints to the

judge's attention, and she acknowledged that she had read the motion (Id.). In response, the court asked a single question, "[a]nd you are the attorney of record on the burglary with intent to commit other felony, correct?"; trial counsel answered in the affirmative (Id.). Without gathering any other information about notice, the judge denied the motion to quash and allowed the hearing to proceed. (Id.; C.R. 104 ("motion denied.")). The State did not present any argument or evidence to support the sufficiency of their motion and did not amend the allegations in the motion before proceeding with the hearing.

Evidence produced at the Adjudication Hearing

At the hearing, the state presented three witnesses: Mr. Silva's community supervision officer Ashley Limas (R.R. 13), Deputy Eric Herrada (R.R. 22) and Mr. Silva's ex-wife Rosemary Silva (R.R. 31) who was also the complainant in the underlying bond violation case and subject of allegation 22 of the State's Motion to Adjudicate. (C.R. 107). The supervision officer and Ms. Silva are the only witnesses the State subpoenaed for the hearing (C.R. 82-88). The State did not subpoena Deputy Herrada or the Silva's son.

Deputy Herrada testified about responding to a disturbance on September 23, 2023 at 1611 Evesham Drive, and observing then photographing damage to the residence and belongings inside (R.R. 24-25; 27). His identification of the potential perpetrator was excluded after a timely hearsay

objection (R.R. 28). The Stated entered Deputy Herrada's photographs of the damage into evidence (R.R. 27).

The State did not call the Silvas' son who was purported to be the actual eyewitness to the alleged September 23 burglary (R.R. 42). Rosemary Silva's testimony about September 23, 2023 was limited after a sustained hearsay objection in which defense counsel pointed out that Rosemary was not present for the events the state was alleging, but learned of them only through a phone call with her son (R.R. 42). The state entered a Ring camera video from September 23 into evidence through Ms. Silva (R.R. 40). Ms. Silva also testified that she saw Mr. Silva over the back fence on September 24, 2023 (R.R. 53), the same day that someone threw a rock through the front window, though she did not witness the throwing firsthand (R.R. 60).

Mr. Silva's defense counsel called one witness to present information about Mr. Silva's mental health diagnoses, his needs, and his lack of treatment for those needs while in jail or on community supervision (R.R. 66-81).

Mr. Silva's Adjudication and Sentence

After the hearing, the court adjudicated Mr. Silva's guilt on precisely the grounds he had complained of in his motion to quash: "Defendant violated the conditions of community supervision . . . by committing an offense against the

state of Texas on or about 9/25/2023 and 9/23/2023."[2] The trial court revoked Mr. Silva's community supervision and sentenced him to 8 years in prison for these violations. Id.

SUMMARY OF THE ARGUMENT

When the trial court denied Mr. Silva's Motion to Quash, the decision disregarded the complete lack of notice in the State's Motion to Adjudicate. There are several levels of specificity required for a charging instrument to provide adequate notice—the state's motion did not even reach the first and most fundamental level of informing him of an offense he was alleged to have committed. Requiring Mr. Silva to proceed to a hearing without notice denied him even the rudiments of due process.

This brief addresses two points of error arising from the same decision; because two different types of defects (substance and form) are evaluated for error and for harm using different standards, they are presented for the Court's consideration separately as Point of Error 1A and Point of Error 1B.

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2 This appeal addresses only the grounds included in the court's written judgment adjudicating guilt: "When a discrepancy exists between the trial court's oral pronouncement and its written order regarding the grounds supporting revocation of community supervision, the written order controls." *Brimzy v. State*, No. 14-22-00631-CR, 2024 WL 1313406, at *1 (Tex. App.—Houston [14th Dist.] Mar. 28, 2024, no pet.) citing *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998).

Point of Error 1A: Defects of Substance

Federal and state constitutions protect the right of the accused to have notice of the charges against him in any proceeding where his liberty is at risk, including a hearing on a motion to adjudicate; this notice must be adequate to allow him to prepare and present a defense. Texas caselaw has developed several basic requisites of notice that are common to all charging instruments:

- All charging instruments must at least outline the elements of the offense the state intends to prove.
- Adequate notice of some offenses requires additional specificity when the statute defining the offense does not fully describe the accusation.
- When an offense includes an underlying offense, that offense must be specifically named

A charging instrument that omits any or, as in this case, all of these fundamental requisites of notice is considered to suffer from defects of substance. Defects of substance impair the accused's ability to investigate or call witnesses, which inhibits his right to prepare and present a defense. Courts evaluate defects of substance from the face of the charging instrument alone. Proceeding to a hearing without correcting a substance defect is error. Proceeding upon a charging instrument that suffers from substance defects so

egregious that the instrument does not allege an offense at all is harmful, reversible error.

In Mr. Silva's case, the State's motion failed to include all of these requisite details: it contained no statutory elements, none among the statutorily defined manner or means of the alleged offenses, and no named felony underlying any potential burglary allegation the state attempted to allege. The vague allegations—"CRIM MISCHIEF >100 <$750" and "BURG-W-INTENT-COMMIT OTHER FELON" did not even offer Mr. Silva fully spelled words to inform him of the nature of the charges against him. This utter lack of information in the charging instrument violated Mr. Silva's due process rights by preventing him from preparing a meaningful defense.

The trial court reversibly erred by overruling Mr. Silva's motion to quash despite these defects and caused Mr. Silva substantial harm.

Point of Error 1B: Defects of form

Under Texas law, even if a charging instrument includes the statutory elements of an offense, the state must also provide sufficient factual detail to allow the defendant to prepare a defense. When such "additional" details are missing, courts evaluate the charging defect as one of "form." Courts' analysis of a form defect evaluates whether the lack of notice impacted the defendant's ability to prepare. This analysis takes into consideration not just the face of the

charging instrument but also the context of the case to determine whether the accused had the information he needed to prepare. If notice is lacking in both the charging instrument and the context of the case, it would be error to proceed without requiring the state to provide adequate notice.

In this case, Mr. Silva requested specifics of the charges against him, including who was harmed and what property was involved—neither the charging instrument nor the context of the case show that Mr. Silva had enough information to clarify the vague allegations before the hearing began. This lack of detail left Mr. Silva guessing about the allegations he would face, hindering his ability to investigate or call witnesses. The omission harmed Mr. Silva's substantial rights, forcing his counsel to rely on speculation instead of preparation, in violation of due process.

Requiring Mr. Silva to defend himself at a hearing without *any one* of the individual pieces of information described above would have impaired his right to notice and to prepare a defense. The State's Motion to Adjudicate was so deficient in substance and form that it deprived Mr. Silva of *all* notice. The trial court reversibly erred in failing to require the state to provide adequate notice before Mr. Silva's hearing began. His adjudication and 8-year prison sentence should be reversed.

ARGUMENT AND AUTHORITIES

POINT OF ERROR 1A

THE COURT ERRED IN DENYING MR. SILVA'S MOTION TO QUASH THE ABBREVIATED ALLEGATIONS IN THE STATE'S MOTION TO ADJUDICATE WHICH DID NOT GIVE MR. SILVA NOTICE OF WHICH OFFENSES HE WAS ACCUSED OF COMMITTING ON 9/25/2023 AND 9/23/2023.

A. Standard of Review

A trial court's denial of a motion to quash a charging instrument is reviewed de novo, *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004)(Changing review on motions to quash a charging instrument from abuse of discretion to de novo because "[w]hen the resolution of a question of law does not turn on an evaluation of the credibility and demeanor of a witness, then the trial court is not in a better position to make the determination, so appellate courts should conduct a de novo review of the issue").

B. *Relevant Law*

a. To provide minimum due process, a charging instrument must include enough information to provide the defendant with adequate notice to prepare a defense

Federal and state constitutions protect the defendant's right to fair notice of the specific charged offense. See U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation ..."); Tex. Const. art. 1, § 10 ("In all criminal prosecutions the accused shall have ... the right to demand the nature and cause

of the accusation against him, and to have a copy thereof."). The Texas Constitution also entitles the accused to due course of law, id. art. 1, § 13; the United States Constitution, to due process, U.S. Const. amend. V. A fundamental element of due process and due course of law is notice of the charges that the accused is facing. *Phillips v. State*, 193 S.W.3d 904, 913 (Tex. Crim. App. 2006).

Notice is equally essential in a motion to revoke any form of community supervision—minimum requirements of due process in probation hearings, outlined by the United States Supreme Court in *Gagnon v. Scarpelli*, include the requirement that the State provide written notice of the claimed violations of probation. 411 U.S. 778, 786, 93 S.Ct. 1756, 1761–62(1973). "The authority of the trial court to revoke probation is limited by the allegations of which the probationer had due notice," *Moore v. State*, 11 S.W.3d 495, 499 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Garner v. State*, 545 S.W.2d 178, 179 (Tex. Crim. App. 1977). "Where a revocation is based upon a violation of the condition not to violate the law, the allegations in the motion must give fair notice and should allege a violation of the law." *Kuenstler v. State*, 486 S.W.2d 367, 369 (Tex. Crim. App. 1972) citing *Jansson v. State*, 473 S.W.2d 40, 42 (Tex. Crim. App. 1971). Accordingly, when it comes to notice,

> there is no clear distinction to be made between indictments and motions to revoke. Both are required to provide the defendant with sufficient information so that he or she may prepare a defense. This is so because the notice requirement is a fundamental part of the judicial process . . .[w]henever the State seeks to exact punishment from an accused, the accused is entitled, under fundamental notions of fairness, to adequate notice. . ."

Labelle v. State, 720 S.W. 2d 101, 108 (Tex. Crim. App. 1986).

The case Mr. Silva provided to the trial court in his Motion to Quash explains this principle plainly:

> While the allegations in a motion to revoke probation do not require the same particularity of an indictment or information, in all fairness the allegations as to violation of probation should be fully and clearly set forth in the revocation motion, so that the defendant and his counsel might be informed as to that upon which he will be called to defend. When the allegations in the motion fail to fully inform the probationer, and the trial court refused to sustain an exception timely filed, the probationer is denied the rudiments of due process.

Garner v. State, 545 S.W.2d 178, 179 (Tex. Crim. App. 1977)(internal citations omitted). Some of the specific technical requisites of an indictment are not required in a charging instrument concerning community supervision; see e.g. C. Cr. P. Art. 21.022(1); (8) (detailing specific language that must appear in an indictment), and technical errors such as the mistitling of a motion, *see e.g. Spruill v. State*, 382 S.W. 518 (Tex. App.—Austin 2012), these technical omissions have been found to be excusable in the context of a motion to revoke community

supervision so long as they do not affect the defendant's understanding of the charges against him.

The core question is whether the defendant received notice adequate to be able to prepare a defense. With these distinctions in mind, this brief addresses notice defects in indictments and motions to revoke interchangeably so long as the caselaw addresses the same core notice principles.

i. Certain omissions that cause a charging instrument to fall short of stating an offense are considered defects of substance

Omitting even a single element of an offense has long been held to be a defect of substance in a charging instrument. *See Smith v. State,* 309 S.W. 3d 10 (Tex. Crim. App. 2010); *Studer v. State*, 799 S.W. 2d 263, 268 (Tex. Crim. App. 1990) ("[A] substance defect is, among other things, a failure to allege an element of an offense in the charging instrument"). Texas law does not statutorily define defects of substance or form; Black's Law Dictionary defines a defect of substance as "[a]n imperfection in the substantive part of a legal document, as by omitting an essential term. Black's Law Dictionary (12th ed. 2024); and a defect of form as "[a]n imperfection in the style, manner, arrangement, or nonessential parts of a legal document, as distinguished from a substantive defect " *Id.* Texas has codified non-exhaustive lists of substance and form defects in indictments which can be instructive in evaluating defects in

other charging instruments. C.Cr.P. 27.08; C.Cr. P. Art. 27.09. Defects of substance used to be classified as "fatal defects" and proceeding on a fatally defective charging instrument was classified as fundamental error, *see Studer v. State*, 799 S.W. 2d 263,267; the law has evolved to require a consideration of preservation and of harm for substance errors such that the term fundamental no longer fits the modern meaning of the term, but the distinction continues to require a distinct standard of review from defects of form. *See Sanchez v. State*, 182 S.W. 3d 34, 46 (Tex. A pp.—San Antonio 2005), aff'd, 209 S.W.3d 117 (Tex. Crim. App. 2006). Defects of substance are evaluated by appellate courts from the face of the charging instrument whereas defects of form (discussed *infra* Point of Error 1B), receive a more searching review and are not error unless, in the context of the entire record, they prejudice the defendant's substantial rights. *Id.*

ii. The accused is not required to guess, deduce, or search outside the charging instrument to determine what he is alleged to have done.

"The trial court may not consider evidence or matters of proof when ruling on a motion to quash or set aside an indictment. . .[but] may only consider whether the face of the indictment sets forth enough information, in plain and intelligible terms, to enable the defendant to prepare his defense." *State v. Diaz–Bonilla*, 495 S.W.3d 45, 51 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd)

(internal citations omitted). The court looks to the charging instrument, not the capias or arrest warrant, to determine what allegations are made as the basis of a revocation hearing. *Jones v. State*, 691 S.W. 3d 671 (Tex. App.— Houston [14th Dist.] 2024, pdr ref'd) *citing Marcum v. State*, 983 S.W. 2d 762 (Tex. App.— Houston [14th Dist.] 1998, Pet. ref'd).

Appellate courts similarly do not search beyond the charging instrument to the greater context of the case in order to evaluate error concerning defects of substance. *See Smith v. State*, 309 S.W. 3d 10, 19 (Tex. Crim. App. 2010)("an *Adams* analysis under Article 21.19 of the Code of Criminal Procedure does not apply to substance defects"). The question of notice provided by the charging instrument is examined "from the perspective of the accused in light of his constitutional presumption of innocence." *DeVaughn v. State*, 749 S.W. 2d 62, 68 (Tex. Crim. App. 1988). It is not enough to assume the defendant knows what he's charged with, the charging instrument itself must provide the notice required to adequately provide due process. *Sanchez v. State*, 182 S.W. 3d at 45 (Tex. App.—San Antonio 2005) citing *Moore v. State*, 473 S.W. 2d 523, 523 (Tex. Crim. App. 1971). The accused is also "not required to anticipate any and all variant facts the State might hypothetically seek to establish." *Brasfield v. State*, 600 S.W.2d 288, 295 (Tex. Crim. App. 1980) (overruled on other grounds).

b. Certain omissions in the charging instrument deprive the accused of minimal due process

"Generally, an indictment is legally sufficient and provides sufficient notice when it tracks the language of the statute in question." *State v. Stukes*, 490 S.W.3d 571, 574 (Tex. App.—Houston [14th Dist.] 2016, no pet.) *citing State v. Moff,* 154 S.W.3d at 602. On occasion, when the statute is "not completely descriptive," such as when the statute includes words of variable definition, or identifies multiple statutory manners and means, more specific pleading is required to provide adequate notice. *Id.* A charging instrument that fails to even outline the elements that track the statute in question is clearly defective since it would fall short of each of these standards of specificity for fair notice.

Speaking practically, a vague charging instrument inhibits specific hearing preparation and investigation tasks when it is "couched in such general terms as to give the appellant no notice as to how he had violated his probationary conditions or to enable him to prepare a defense or to determine what witnesses to subpoena." *Kuenstler v. State*, 486 S.W.2d 367, 368 (Tex. Crim. App. 1972).

i. **The accused cannot prepare a defense given only the name of the offense he is accused of committing.**

No case has ever said that the mere abbreviated name of an offense gives the accused sufficient notice to prepare his defense—it clearly does not. On the contrary, even with completely spelled words, a motion to adjudicate does not afford fundamental due process when it only states the name of an offense,

Kuenstler, 486 S.W.2d 367 (Tex. Crim. App. 1972)(State's motion to revoke was defective when it alleged "theft" generally), or even when it states the general name of an offense committed on a specific date and gives reference to a separate Harris County cause number, *Garner v. State*, 545 S.W.2d 178 (Tex. Crim. App.1977). The Court of Criminal Appeals in each circumstance found that the trial court had committed reversible error by overruling the defendant's exception to the State's motion.

ii. The accused cannot prepare a defense when the charging instrument does not include an act or omission he committed in violation of a statute that could be violated in multiple ways.

For the purposes of argument, even if an abbreviated reference to a criminal offense *were* enough to identify which statute Mr. Silva was alleged to have violated, the statutes upon which the state abbreviatedly referenced both fall under the category of statutes that contain multiple statutorily defined manners and means. A charging instrument is deficient to provide notice when it "defines the manner or means of commission in several alternative ways . . . [and the charging instrument] neglects to identify which of the statutory means it addresses." *See State v. Zuniga*, 512 S.W. 3d 902, 907 (Tex. Crim. App. 2017). While the state may plead *all* available manner and means of an allegation conjunctively without creating a notice problem, omitting the manner and means altogether *does* create a notice problem— "then upon timely request, the

State must allege the particular manner or means it seeks to establish," and a failure to require the state to do so would be error. *Williams v. State*, 685 S.W. 3d 110, 115 (Tex. Crim. App. 2024) *citing Ferguson v. State*, 622 S.W. 2d 826, 849-51 (Tex. Crim. App. 1981) (op. on State's mot. for reh'g).

Burglary under Tex. Penal code §30.02(a) is an offense which includes multiple statutory manners and means of commission under subsections 1, 2, and 3: §30.02(a)(1) addresses "entering a habitation or building. . ." §30.02(a)(2)addresses "remaining concealed in a building or habitation," each with intent to commit "felony, theft, or assault;" or §30.02(a)(3) addresses entering a building or habitation and committing or attempting to commit felony, theft, or , assault.

The statutory manner and means must be specified in the charging instrument to give the defendant fair notice. *Ex parte Oliver*, 703 S.W. 2d 205, 206 n.1 (Tex. Crim. App. 1986) (" The indictment, not properly stating an offense under Sec. 30.02(a)(1)(2), or (3) is therefore fundamentally defective for the offense of burglary..."). Criminal mischief under Tex. Penal Code §28.03(a) is the same: §28.03(a)(1) addresses "intentionally or knowingly damaging or destroying tangible property," §28.03(a)(2) addresses "tampering with tangible property"; and §28.03(a)(3) addresses "making markings on tangible property." *See also Miller v. State,* 647 S.W.2d 266 (Tex. Crim. App. 1983) (charging instrument was

defective when it failed to specify manner and means by which the defendant damaged and destroyed property.)

Adequate notice of a burglary allegation also requires the State to specifically name the "other felony" by which the accused allegedly committed the burglary, though it is not necessary to list the elements of the underlying felony. *Ex parte Cannon*, 546 S.W.2d 266, 272 (Tex. Crim. App. 1976)(overruled on other grounds). Though the state would not have been required to further detail the elements of the underlying "other felony." *State v. Stukes*, 490 S.W.3d 57 (Ct. App.—Houston [14th Dist.] 2016).

When the State relies on a charging instrument that fails to spell out the full name of the offense, includes none of the statutory elements, and also fails to reach this additional required level of specificity, it is that much more deficient; such a charging instrument gives the accused no information about what specific accusation he is meant to defend himself against.

C. *Application*

a. *The allegations in the State's motion were not specific enough to provide minimum due process of sufficient notice*

The State notified Mr. Silva and the court that they believed he violated the terms of his community supervision by "commit[ting] the criminal offense of CRIM MISCHIEF >100 <$750," and "the criminal offense of BURG-W-

INTENT-COMMIT OTHER FELON." (C.R. 106). From Mr. Silva's perspective, and presuming his innocence, these allegations give him absolutely no information that would have allowed him to prepare his defense.

Not only did the state's motion omit *all* the elements of the offenses they were attempting to allege, the motion also did not designate *any* manner and means to distinguish any subsection of the criminal mischief or burglary statutes or name which "OTHER FELON" the State would seek to prove Mr. Silva intended to commit. The charging paragraphs in the motion to revoke were so vague that they failed to meet each and every level of specificity required to give Mr. Silva adequate notice of the particular offenses they attempted to allege.

As has been true for decades since cases such as *Kuenstler,* such bare assertions "give the appellant no notice as to how he violated his probationary conditions or to enable him to prepare a defense…" 486 S.W. 2d at 368.

When Mr. Silva notified the court that the notice provided did not allow him to prepare a defense, the court overruled his motion and required him to proceed.

D. *Harm*

When charging instrument that does not even give the accused notice of the offense he is alleged to have committed by omitting one, or as in this case, *every* essential element of the offense, that omission is a substance defect.

Thompson v. State, 44 S.W.3d 171, 182 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *see also* C.Cr.P. Art 27.08(1)(statutorily defining this defect as one of substance when it occurs in an indictment). When the accused has informed the court in a timely motion to quash that this defect has left him unable to prepare a defense, the court's failure to quash the indictment, this "has been, and still is, treated as error harmful under any harm analysis." *Thompson*, 44 S.W.3d at 183.

The question of which modern harm analysis should apply to a substance defect error has been the subject of a slowly evolving doctrine—the Court of Criminal Appeals determined in *Mercier v. State* that a defect in an indictment lacking a tolling provision (defined as a substance defect in an indictment under C.Cr. P. Art. 27.08(2) is subject to a non-constitutional harm analysis under Texas Rule of Appellate Procedure 44.2(b). 322 S.W. 3d 258, 264 (Tex. Crim. App. 2010). Lower courts have extended this ruling to other substance defects, see e.g. *Smith v. State*, No. 01-07-00860-CR, 2011 WL 5116458, at *2 (Tex. App.—Houston [1st Dist.] Oct. 27, 2011, no pet.), (on remand from 309 S.W. 3d 10; not designated for publication); decided after *Mercier,* applying 44(b) to a substance defect leaving out language concerning tolling of the statute of limitations). Nevertheless, no court has directly examined whether 44(b) would also apply to defects akin to an Article

27.08(1) substance defect in which the charging instrument fails to state an offense altogether. This court's decision in *Thompson*, the latest to address a 27.08(1) substance defect directly, is controlling even if this court were to apply a 44(b) analysis—regardless of the harm analysis applied, the harm caused by such a crucial defect is harmful. *Thompson v. State*, 44 S.W. 3d at 183. This is because defect like that identified in Art. 27.08(1) that causes an indictment to provide no notice that an offense that has been committed is uniquely harmful— any charging instrument with such a defect cannot logically provide adequate notice to prepare a defense, *Id.* This is consistent with a long line of cases reaching back to *Kuenstler*, 486 S.W. 2d at 368, that identifies this kind of defect as the first in a domino effect of rights impairments, including the right of the accused to prepare a defense and call witnesses on his behalf. See also *Malik v. State*, 953 S.W. 2d 234 (Tex. Crim. App. 1997)(proceeding on an unamended indictment "will undoubtedly [entitle the defendant] to a new trial based upon trial error for potentially any number of issues, including lack of notice for due process purposes.").

Because the allegations of new law violations in the State's Motion failed to allege an offense, Mr. Silva was not given notice of the charges against him, and he could not properly prepare to defend himself. In this case, evidence of that harm can be found in the motion to quash and counsel's statements in

court—Mr. Silva identified the deficiencies of substance (and of form, discussed below in Point of Error 1B) in the State's Motion to Adjudicate and informed the court that he had not been able to prepare a defense based on that complete lack of notice. Because the court nevertheless required him to proceed in the hearing based on the deficient State's Motion, Mr. Silva was denied the basic rudiments of due process, which caused him harm.

Because the substance defects in the State's Motion to Adjudicate deprived Mr. Silva of adequate notice to prepare a defense, and because his substantial rights were harmed by that deprivation, Appellant respectfully asks this Court to reverse his adjudication and remand to the trial court for subsequent proceedings with adequate notice.

POINT OF ERROR 1B

APPELLANT'S MOTION TO QUASH REQUESTED ADDITIONAL INFORMATION INCLUDING THE NAME OF THE COMPLAINANT AND INFORMATION IDENTIFYING THE PROPERTY ALLEGED TO HAVE BEEN BURGLARIZED AND DAMAGED IN PARAGRAPHS 1 AND (SECOND) 1 OF THE STATE'S FIRST AMENDED MOTION TO ADJUDICATE, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION.

A. Relevant Law

Even when a charging instrument *does* include information regarding all the necessary elements of the offense, it can nevertheless suffer from a defect in form that deprives the accused of a requisite item of notice—the defendant may then request "additional factual information" upon which to prepare a defense,

and it could be error to deny such a request. *See e.g. State v. Goodman*, 221 S.W.3d 116, 120 (Tex. App.—Ft. Worth 2006)(no pet.). For such defects in form, appellate courts apply a harm-focused evaluation to determine whether there is error at all before even reaching an evaluation of harmlessness: courts "decide whether the charging instrument failed to convey some requisite item of 'notice.' If sufficient notice is given, this ends our inquiry. If not, the next step is to decide whether, in the context of the case, this had an impact on the defendant's ability to prepare a defense, and, finally, how great an impact." *Adams v. State*, 707 S.W. 2d 900, 903 (Tex. Crim. App. 1986). While "[t]he state need not allege facts that are merely evidentiary in nature," *State v. Mays*, 967 S.W.3d 404, 406), the analysis for form defects is meant to identify those omissions which do impact notice to the accused.

In contrast to substance defects, this analysis of form defects includes an evaluation of the defect *and* its impact in the greater context of the case—for form defects, this analysis occurs at the error stage before the court reaches an evaluation of harm— this is a "special type of statutory harmless error analysis for charging instruments under Article 21.19 of the Code of Criminal

Procedure." *Sanchez v. State*, 182 S.W.3d 34, 38 (Tex. App.—San Antonio 2005), aff'd, 209 S.W.3d 117 (Tex. Crim. App. 2006).[3]

B. Application

Even if the state had included elements that tracked the respective statutes and had specified the statutory manner and means upon which they intended to proceed, it was also error to deny Mr. Silva's request for the name of the complainant and description of the properties alleged to have been burglarized and damaged. This is information essential to the preparation of a defense which would affect his investigation and calling of witnesses. Nothing in the record shows that Mr. Silva could have been aware of this information from "the context of the case"; though Mr. Silva filed a motion requesting discovery (C.R. 70), the Court's cursory questioning did not develop any facts about discovery, or what information may have been provided in Mr. Silva's related cases. Cf. *Kellar v. State*, 108 S.W. 3d 311 (Tex. Crim App. 2003) (finding

[3] This approach has been sharply criticized from the outset in opinions written by Judge Onion, who first wrote in dissent in *Labelle's* application of the *Adams* test to defects of form in Motions to Revoke Probation, *Labelle v. State*, 720 S.W.2d 101, Dissenting Opinion, pp. 110-112; Judge Onion then criticized, but applied the test nearly twenty years later as a visiting Court of Appeals judge in *Sanchez v. State*, 182 S.W.3d at 38 ("*Adams* has cast an additional burden upon a defendant to show from the 'context of the case' how the defendant was harmed in preparing and presenting his defense despite the unremedied error in the charging instrument, leaving the State as the beneficiary of the trial court's error in overruling the challenge to the charging instrument.").

no error when form defect was coupled with "extensive and detailed discovery" gave appellant "ample notice" of the charges against him).

The only direct mention of discovery being reviewed by the defense before the hearing came during the direct examination of Mr. Silva's mitigation witness, Dr. Rockett, who testified that she observed Mr. Silva's behavior on the Ring video and saw it as evidence of his untreated mental health disorders (R.R. 76). The ring video (State's Exhibit 19) did not contain a date or location of the conversation or acts that it depicted. Without subpoenas in the record for the Silvas' son or the investigating officer in the burglary offense, Mr. Silva also had no information upon which to base an investigation of the witnesses against him, or to know which witnesses he should call to present his defense. These fact-specific details were requisite items of notice.

Considering the presumption of innocence, the bare allegations in the charging instrument coupled with a single piece of contextless evidence in the "context of the case" left Mr. Silva to speculate as to who and what he was being accused of harming— he could not have deduced or guessed these details. See *Sanchez v. State*, 182 S.W.3d at 52 (finding error when Appellant was "left to speculate what . . . the State would seek to prove, hampering any investigation and preparation for trial.")

This case is distinguishable from others affirmed by appellate courts when the context of the case showed that appellant had the notice needed from the "context of the case." In *Adams v. State*, the case that established this test for form defects, the court held that charging instrument identified "certain [illegal] material, to-wit: one (1) motion picture, the title of which is unknown" did not contain a form defect did not affecting substantial rights when despite the failure to specify which between two identifiable motion pictures defendant was alleged to have promoted, 707 S.W. 2d 900, 901; 904 (Tex. Crim. App. 1986). This was because the record showed that counsel had viewed both films, Id. at 904— no such awareness of the facts is demonstrated in the record here. Cases that followed *Adams* in determining that the trial court did not err are also more like *Adams* than the present case. For example, in *Marcum v. State*, 983 S.W.2d 762, 767 the charging instrument identified the complainants as "an unnamed thirteen year old female and Dwayne LNU, his nephew"; the court found that the initials and general reference were sufficient to identify the complainants when the context of the case showed that those were the terms that the appellant himself had used to refer to them in his statements. In each of these cases, the charging instrument alleged *at least some factual information* from which the accused could use the "context of the case" to interpret the unspecific information in the State's allegations. In stark contrast, the charging instrument

in this case provided no basis for interpretation; it invited only baseless speculation as to what facts the State could possibly allege.

As such, this case is more like *Sanchez v. State* in which the Court of Appeals found (and the Court of Criminal appeals affirmed) that the appellant did not receive enough information to be able to identify the object of his alleged criminal damage, 182 S.W.3d at 52. Considering the presumption of innocence and the limited record of what was provided pretrial in this case, Mr. Silva cannot be presumed to have already known any of the information his Motion to Quash requested the Court to order the State to provide.

C. Harm

The State's bare allegations omitted all basic factual information that could align the alleged law violations to Mr. Silva's specific case. Just like the omissions of substance discussed above in Point of Error 1A, these omissions of form were so utter and complete that requiring Mr. Silva to continue to a hearing without the information requested affected his substantial rights. If his counsel had any success in cross-examining witnesses, or making argument on Mr. Silva's behalf, it is because they were fortunate enough to have speculated about the allegations the State would bring forth at the hearing and make preparations based on speculation alone. According to the presumption of innocence and the right to adequate notice, that speculation should never have

been required of them. See *Brasfield v. State*, 600 S.W.2d 288, 295 (Tex. Crim. App. 1980) *overruled on other grounds*; see also *Sanchez v. State*, 182 S.W.3d at 52.

Because the form defects in the State's Motion to Adjudicate deprived Mr. Silva of adequate notice to prepare a defense, and because his substantial rights were harmed by that deprivation, Appellant respectfully asks this Court to reverse his adjudication and remand to the trial court for subsequent proceedings with adequate notice.

CONCLUSION AND PRAYER

For the reasons stated above, Abram Silva prays that this Honorable Court sustain his points of error, reverse the judgement of conviction entered below, and remanding to the trial court for a new hearing with adequate notice.

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically served via Texas e-file on the Harris County District Attorney on the day the brief was filed.

/s/ Amanda Koons
_____
Amanda Koons

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i) (3), undersigned counsel certifies that this brief complies with all form requirements of TEX. R. APP. PROC. 9.4.

Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 6589 words printed in a proportionally spaced typeface.

/s/ Amanda Koons
_____
Amanda Koons

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