NOS. 01-24-00410-CR & 01-24-000413-CR

IN THE COURT OF APPEALS

FIRST JUDICIAL DISTRICT

AT HOUSTON, TEXAS

AKINTAYO TAIWO AKINRINLOLA,
Appellant,

VS.

THE STATE OF TEXAS,
Appellee.

ON APPEAL FROM THE 405TH DISTRICT COURT
OF GALVESTON COUNTY, TEXAS
TRIAL COURT CAUSE NOS. 22-CR-4315 & 23-CR-0180

BRIEF FOR APPELLANT

BRIAN W. WICE
440 Louisiana Suite 900
Houston, Texas 77002-1635
(713) 524-9922 PHONE
(713) 236-7768 FAX
Bar No. 21417800
wicelaw@att.net

COUNSEL FOR APPELLANT
ORAL ARGUMENT REQUESTED

IDENTIFICATION OF THE PARTIES

Pursuant to Tex. R. App. P. 38.1(a), a list of all interested parties is provided so members of this Court may determine if they are disqualified to serve or should recuse themselves from participating in this matter:

Complainant:
The State of Texas

Appellant-Criminal Defendant:
Akintayo Taiwo Akinrinlola

Trial Counsel for Appellant:
Ronald G. Ray, Sr.
P.O. Box 90278
Houston, Texas 77290

Counsel on Appeal for the Appellant:
Brian W. Wice
440 Louisiana Suite 900
Houston, Texas 77002-1635

Counsel for the State:
Katelyn Willis & Tyler Alley
Galveston County Attorney's Office
600 59th Street Suite 1001
Galveston, Texas 77551

Trial Judge:
Honorable Jared Robinson
405th Judicial District Court
Galveston County, Texas

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

PAGE

CASES:

INTRODUCTION

> To catch drug dealers is laudable. But to catch them by unlawful means is lamentable.[1]
>
> Justice requires more than a proceeding that reaches an objectively accurate result; trial by ordeal might by sheer chance accomplish that. It requires a proceeding that by obvious fairness helps to justify itself.[2]

This trial presents in unmistakable terms a wholesale breakdown in the adversarial process that should undermine this Court's confidence in the reliability of its outcome.[3] Appellant was arrested without a warrant based on nothing more than his mere presence at the scene for possession with intent to deliver a controlled substance secreted in a container that he never handled, claimed ownership of, or opened. Appellant's cell phone containing a host of incriminatory text messages that formed the heart of the prosecution's case was seized and searched based on a search warrant affidavit with probable cause as weak – if not weaker – than those found constitutionally deficient by the Court of Criminal Appeals and this Court.

Shockingly, Appellant's co-defendant Dalton Brown, whose own guilt

---

[1] *State v. Jeremiah*, 696 A.2d 1220, 1225 (R.I. 1997).

[2] *Le v. Mullin*, 311 F.3d 1002, 1030 (10th Cir. 2002)(Henry, J., concurring).

[3] *Cf. Caballero v. State*, 695 S.W.3d 467, 488-89 (Tex.App.– Houston [1st Dist.] 2024, pet. ref'd); *Dryer v. State*, 674 S.W.3d 635, 652 (Tex.App.– Houston [1st Dist.] 2023, pet. ref'd).

seemed manifest given his ownership and handling of the contraband, was acquitted after his lawyer was able to not only suppress the text messages in his cell phone but mount a compelling and ultimately successful effort at convincing the jury that his client was merely present at the scene.

Appellant was not nearly as lucky. His lawyer failed to mount what would have been a meritorious challenge to his warrantless arrest and the recovery of text messages from his cell phone. And, to add insult to injury, Appellant's counsel may well have waived any appellate challenge to his otherwise meritorious Fourth Amendment claims. Unlike his clearly more culpable co-defendant who left the courthouse with his family, friends, and freedom, Appellant left it in the custody of the bailiff with a 25-year prison sentence.

The criminal justice system makes two promises to every defendant: a fundamentally fair trial and an accurate result.[4] The trial court's denial of Appellant's motion to suppress made it improbable to keep the former; its denial of his motion for new trial made it impossible to keep the latter. Only by reversing Appellant's convictions can this Court belatedly keep the two solemn promises the criminal justice system broke in May 2024.

---

[4] *Ex parte Thompson*, 153 S.W.3d 416, 421 (Tex.Crim.App. 2005)(Cochran, J., concurring).

STATEMENT REGARDING ORAL ARGUMENT

This appeal presents a trio of consequential, constitutional issues in a unique procedural posture that warrants oral argument. Appellant has argued that his warrantless arrest and seizure of his cell phone violated the Fourth Amendment. But, he has also urged, in the alternative, that his counsel's failure to preserve these meritorious issues violated the Sixth Amendment's guarantee to the effective assistance of counsel.

The State defeated Appellant's Sixth Amendment complaint at the motion for new trial hearing by repeatedly arguing that counsel preserved these issues for review. Confronted with the reality that this Court might sustain these challenges if it reaches the merits, the State will no doubt shift gears and assert that these meritorious claims were not preserved. Oral argument will significantly assist this Court in the decisional process not just on the merits of his constitutional claims but whether the State's eleventh-hour about-face can withstand serious scrutiny, and the doctrine of judicial estoppel precludes it from even raising this last minute claim to defeat Appellant's Fourth and Sixth Amendment challenges.[5]

---

[5] Tex. R. App. 39.1 (party who requests oral argument may argue the case unless the court decides it is frivolous or the decisional process would not be significantly aided by oral argument).

STATEMENT OF THE CASE

Convicted of possession with intent to deliver more than 400 grams of ketamine and engaging in organized criminal activity, Appellant was sentenced to twenty-five years in prison.[6] Certification of the right to appeal[7] and notice of appeal[8] were timely filed. Following an evidentiary hearing, Appellant's motion for new trial was denied on June 21, 2024.[9]

APPELLANT'S POINTS OF ERROR

POINT OF ERROR NUMBER ONE

The trial court erred in denying Appellant's motion to suppress because his warrantless arrest was unsupported by probable cause.

POINT OF ERROR NUMBER TWO

The trial court erred in denying Appellant's motion to suppress because the affidavit in support of the search warrant relied upon by law enforcement to seize Appellant's cell phone failed to state probable cause.

POINT OF ERROR NUMBER THREE

The trial court abused its discretion in denying Appellant's motion for new trial alleging that he was denied the effective assistance of counsel at the guilt-innocence stage of trial.

---

[6] CR 90 (delivery of controlled substance); CR 46 (engaging in organized criminal activity).

[7] CR 95; CR 51.

[8] CR 97; CR 53.

[9] CR 287; CR 267.

STATEMENT OF FACTS

A. Counsel's pretrial motion to suppress and legal research.

Counsel's motion to suppress sought to suppress all evidence and the arrest itself based on the lack of probable cause[10] "as follows":

- photographs, videotapes and/or digital images of the Defendant;
- testimony of law enforcement or their agents; and
- all physical evidence seized from his co-defendant.[11]

Counsel acknowledged that he delegated the task of conducting legal research in these cases to Leah Stevenson, an entertainment lawyer in Los Angeles and friend of Appellant who was licensed in January 2021.[12] Stevenson drafted research memoranda on the suppression issues,[13] trial preparation,[14] and jury selection.[15] Her work relied exclusively on foreign and federal cases of almost no relevance, and did not cite or discuss *State*

---

[10] Counsel argued Appellant's "Fourth Amendment rights [were] being violated in that probable cause was not established for [his] detention and arrest." 2 RR 13.

[11] MNT 2. Exhibits from the motion for new trial hearing are referred to as "MNT_."

[12] www.morrisoncooper.com/team-members/leah-stevenson (last visited May 13, 2024); MNT 21 at 1 (affidavit of Ronald Ray)("affidavit").

[13] MNT 5.

[14] MNT 5.

[15] MNT 6.

v. Baldwin,[16] the seminal case impacting suppression of the text messages from Appellant's cell phone. Her research also failed to provide counsel any guidance insofar as suppressing Appellant's warrantless arrest.[17]

B. The prosecution's opening statement.[18]

In her opening statement, the prosecutor cited incriminatory text messages from Appellant's cell phone as evidence of his guilt even though there had been no judicial determination that the seizure of his cell phone, let alone his arrest, was constitutionally proper:[19]

- "What I expect you'll see in these text messages and hear from Detective Cauley is that [Appellant] has been selling drugs for a long period of time, that he sends in shipments from his distributors

---

[16] 664 S.W.3d 122 (Tex.Crim.App. 2022). Stevenson's research consisted of one Texas case, *State v. Johnson*, 939 S.W.2d 586 (Tex.Crim.App. 1996), a decision without any relevance or value to the suppression issues facing counsel. *See* n.62, *infra.*

[17] The State's claim at the motion for new trial hearing that Stevenson's research was "pretty significant," 6 RR 26-27, is, as recounted above, utterly devoid of merit. Not only were the cases she cited from foreign and federal jurisdictions wholly without precedential value, the State's avowal that Stevenson should be commended for having cited *Franks v. Delaware* is a non sequitur given that counsel never bothered to seek a *Franks* hearing to challenge the search warrant.

[18] The trial court ordered Appellant's motion to suppress to be carried with trial. 2 RR 13-14. *See Garza v. State*, 126 S.W.3d 79, 84 (Tex.Crim.App. 2004)(approving the method used by the trial court and holding the claim in the defendant's motion to suppress was preserved for review). The trial court did not rule on the motion to suppress until after a jury had been seated, 2 RR 115, and the State began presenting its case-in-chief. *See* pp. 12-13, *infra.*

[19] Counsel did not file a motion in limine or otherwise see to keep the State from mentioning these highly inculpatory texts unless and until the trial court concluded that the admission of this evidence complied with the Fourth Amendment. The only motion in limine counsel filed dealt with Appellant's criminal history. MNT 16.

overseas, that he sends multiple text messages about how much ketamine he has to sell. ... And you're going to hear how this is [Appellant's] job."[20]

- "You will see that these three people were going to share in the profits of this ... I expect that you will hear that [Appellant] was then going to distribute and sell these narcotics. And you will see that through his [text] messages as well."[21]

C. Admission of the drugs, lab report, and texts without objection from defense counsel before the trial court ruled on their admissibility.

In November 2022, Customs and Border Protection Officer Anthony Irizarry inspected a package[22] en route to Galveston from Germany and found that its contents tested positive for ketamine.[23] He detained the package, addressed to Lisa Pimbley, by placing it in a vault.[24] Appellant's name was not on the package.[25]

Robert Vera, formerly employed by the Department of Homeland Security, was tasked with determining who would pick up the package.[26]

---

[20] 2 RR 132.

[21] 2 RR 133.

[22] The package was identified as State's Exhibit 1. 3 RR 90.

[23] 3 RR 20-21.

[24] 3 RR 21-22.

[25] 3 RR 26.

[26] 3 RR 33.

In December 2022, Vera was part of the cadre that monitored the delivery of the package to a Holiday Inn in Galveston.[27] After Vera observed a black male – later identified as Appellant's co-defendant Dalton Brown[28] – exit the Holiday Inn with the package, other officers made contact with Brown before he could leave the scene with the package.[29]

Homeland Security Investigator Kenneth Bradley was a member of the unit that monitored the delivery of the package in December 2020 at the Holiday Inn.[30] He observed Brown exit a vehicle with a second black male at the wheel – later identified as Appellant[31] – and leave the Holiday Inn with the package.[32] As Brown was being arrested by the other officers, Bradley confronted Appellant, who had gotten out of the vehicle, drew his firearm, ordered him to freeze and arrested him.[33] Bradley admitted that Appellant made no effort to go into the hotel with Brown, did not flee, and

---

[27] 3 RR 33-34.

[28] 3 RR 53.

[29] 3 RR 35-36; 39-40.

[30] 3 RR 49-50.

[31] 3 RR 54.

[32] 3 RR 51-53.

[33] 3 RR 53-54.

had no interaction with the package that Brown carried.[34]

Texas Department of Public Safety forensic chemist Lauren Molina tested a white substance inside a medicine ball that she determined was ketamine, a controlled substance, that weighed 4.10 kilograms.[35]

Matthew Cauley, a former Galveston Police Department officer, was part of the team that monitored the delivery of the package that police had intercepted.[36] Cauley learned that Brown requested the intercepted package that became the basis for its controlled delivery on December 9, 2022.[37] Cauley identified Brown as the person who exited the vehicle that was parked outside the Holiday Inn.[38] Cauley identified the driver of that vehicle, who was arrested along with Brown, as Appellant.[39]

Cauley searched the cell phones belonging to Appellant and Brown pursuant to search warrants he obtained.[40] When the State offered these

---

[34] 3 RR 59-60; 62.

[35] 3 RR 78; 83. Molina's lab report identifying the ketamine and a heat-sealed box containing the drugs were admitted without objection. 3 RR 77; 3 RR 93-94.

[36] 3 RR 89.

[37] 3 RR 98.

[38] 3 RR 98-99. Cauley was able to identify Brown from a photograph he obtained. 3 RR 99.

[39] 3 RR 103-04.

[40] 3 RR 106.

warrants,[41] the trial court overruled Appellant's objections, granting him a running objection.[42] Cauley conducted a forensic extraction[43] of both cell phones and recovered a tremendous amount of text messages from both devices.[44] Some three dozen text messages recovered from Appellant's phone[45] were admitted over Appellant's objections.[46]

Cauley testified without objection that after Appellant was arrested and invoked his constitutional right to counsel, Cauley could not interview him.[47] Cauley examined the cell phones of Appellant and Brown pursuant to State's Exhibits 3 and 4, search warrants law enforcement used to seize and search them.[48] When the State offered these exhibits, counsel objected and took Cauley on voir dire where he elicited that:

---

[41] These warrants were identified and admitted as State's Exhibits 3 and 4. 3 RR 106; 111.

[42] 3 RR 110-11.

[43] The "data dump" from this extraction was admitted as State's Exhibits 5 and 39. 3 RR 132. A report of this extraction was admitted as State's Exhibit 57. 3 RR 133-34. Screen shots from Appellant's phone were admitted as State's Exhibits 40-56. 3 RR 135.

[44] The text messages from Brown's phone were admitted over objection as State's Exhibits 8-38. 3 RR 117. The text messages from Appellant's phone were admitted as State's Exhibits 58-94.

[45] State's Exhibits 58-94. 3 RR 145.

[46] 3 RR 145-46.

[47] 3 RR 104.

[48] 3 RR 105-06.

- Brown implicated Appellant in a jailhouse interview.[49]
- Because Brown was "very extremely fearful [sic] of Appellant, he was reluctant to speak with the officers.[50]
- Brown's extreme fear of Appellant led Brown to "hide behind the door and ... mostly use hand gestures and head nods when referring to [Appellant]."[51]

When the State moved to admit the warrants, there was an off-the-record discussion where counsel's objections were overruled.[52]

State's Exhibits 5 and 39, a phone dump and manual extraction from Appellant's cell phone containing some 100 screen shots of texts from his cell phone were admitted over counsel's "continuing" objection that did not preserve error.[53] Counsel objected to the last three dozen texts because they were "disconnected evidence that is being presented that is not connected to the charge in this particular case."[54] Counsel did not argue

---

[49] 3 RR 108.

[50] 3 RR 109.

[51] 3 RR 109.

[52] 3 RR 111. Although the trial court gave counsel a running objection, counsel's objections were not on the record. *See* Tex. R. Evid. 103(a)(1)(A)(B)(requiring party objecting to the admission of evidence to state a specific ground for its exclusion on the record); *Perez v. State*, 261 S.W.3d 760, 764 (Tex.App.– Houston [14th Dist.] 2008, pet. ref'd)(defendant's burden to bring forward a record sufficient to warrant reversal).

[53] 3 RR 132. *See* note 52, *supra*.

[54] 3 RR 145-46.

that these texts were inadmissible because the search warrant affidavit law enforcement used to obtain them was constitutionally deficient under *Baldwin*.[55] The trial court overruled counsel's objection and admitted these exhibits.[56]

D. Counsel's arguments in support of his motion to suppress and the trial court's ruling.

Outside of the jury's presence, Appellant renewed his request to "suppress all the drugs that have been introduced in this case" because:

- The drugs were obtained from an illegal arrest.[57]
- There was no probable cause to arrest Appellant because he was "acting lawfully" in Galveston County on December 9, 2022.[58]

Counsel did not tell the trial court he was challenging the seizure of Appellant's cell phone based on the affidavit's failure to state probable cause to seize it and did not provide any authority supporting his claim.[59] Instead, counsel argued the phone records should be suppressed because

---

[55] 3 RR 145-46.

[56] 3 RR 146.

[57] 3 RR 169.

[58] While this record reveals counsel argued "there was probable cause to arrest [Appellant]," 3 RR 169, counsel either misspoke or the court reporter incorrectly transcribed counsel's comment.

[59] 2 RR 13.

"a lie was told to obtain the search warrant."[60] Asked by the trial court exactly what this lie was, counsel asserted that Cauley lied about Brown implicating Appellant during his jailhouse interview.[61] Counsel cited *State v. Johnson,*[62] for the principle that the text messages "were disconnected and ... were remote acts outside of the crime in this particular case."[63] In response, the State countered that there was no basis to "go back and suppress what has already been overruled and admitted by the Court..."[64]

The trial court denied Appellant's motion to suppress and overruled his objection[65] to the admission of "all the phone records."[66]

E. The State's final arguments.

The State repeatedly emphasized the torrent of texts in its opening

---

[60] 3 RR 170. These records, however, had already been admitted over counsel's unrecorded off-the-record objection. *See* note 52, *supra.*

[61] 3 RR 170.

[62] A review of counsel's file reveals that he was referring to *State v. Johnson*, 939 S.W.2d 586 (Tex.Crim.App. 1996), holding that the Texas exclusionary rule applies to private citizens as well as peace officers, a decision that did not support counsel's ineffectual suppression argument.

[63] 3 RR 170.

[64] 3 RR 173.

[65] 3 RR 175.

[66] 3 RR 169.

and rebuttal summations as the best evidence of Appellant's guilt:

- We asked you and your colleagues how does one prove possession with the intent to deliver? And some of the examples were text messages...[67]

- What does engaging [in organized criminal activity] look like? It looks like ... piles of text messages.[68]

- The reason we bring you these text messages ... is to show you that this was the ongoing criminal activity, that it was the ongoing plan.[69]

- "Are you speaking drug dealer to me? Yep. LOL." Those words came from the phone of [Appellant].[70]

- What I am required to bring you is the intent to share in the profit of this combination. That is in [Appellant's] messages.[71]

- We brought you messages of multiple other packages being sent. We brought you many messages of [sic] him. Who needs K? I got to move a lot of weight. 150 for a zip.[72]

- This is [Appellant's] job. This is what he does, and we have two years of text messages to prove it.[73]

---

[67] 4 RR 37.

[68] 4 RR 38.

[69] 4 RR 39.

[70] 4 RR 53

[71] 4 RR 57.

[72] 4 RR 58.

[73] 4 RR 58.

- There is no doubt in either of these cases. And every element can come from these messages. Every element can come from these texts.[74]

F. The motion for new trial hearing.

The trial court took judicial notice of the reporter's record and clerk's record and that the motion for new trial was timely filed and presented, sworn to, and timely heard.[75] Without objection, the trial court admitted the twenty exhibits attached to Appellant's motion for new trial[76] as well as the affidavit of trial counsel Ronald Ray.[77]

---

[74] 4 RR 60.

[75] 6 RR 6-7. The trial court sustained the State's objection when Appellant asked the trial court to take judicial notice that Appellant's co-defendant Dalton Brown was acquitted of possession with intent to deliver more than 400 grams of a controlled substance on March 6, 2024, and co-defendant Christine Jara pleaded guilty to a reduced charge and received sixty days in jail on May 7, 2024. But, the trial court's ruling is clearly wrong. Because the trial court erred, Appellant asks this Court to take judicial notice that the Galveston County District Clerk's website reflects what happened to both Brown and Jara. *See e.g., Peraza v. State*, 457 S.W.3d 134, 142 & n. 5 (Tex.App.–Houston [1st Dist.] 2014], *rev'd on other grounds*, 467 S.W.3d 508 (Tex.Crim.App. 2015)("this Court and others have repeatedly taken judicial notice of information available on various websites..."). And, because the State did not object when Appellant made his uncontradicted offer of proof on this very issue, this Court must accept it as true. *Pitts v. State*, 916 S.W.2d 507, 510 (Tex.Crim.App. 1996)(appellate courts must accept as true counsel's uncontradicted offer of proof).

[76] 6 RR 7-8. These exhibits were offered as "MNT 1-20," 6 RR 8-9, and appear in Vol. 7.

[77] 6 RR 9. Appellant acknowledged that there was a minor typographical error in Mr. Ray's affidavit that neither the former nor the latter managed to spot. 6 RR 9-10.

SUMMARY OF THE ARGUMENT

1. The trial court erred in denying Appellant's motion to suppress because his warrantless arrest was unsupported by probable cause even when the trial court's ruling is viewed in the light most favorable to the trial court's ruling. All police knew at the time of Appellant's arrest was that he gave his co-defendant Dalton Brown a ride to a hotel where police had arranged a controlled buy of a shipment of ketamine. Brown, not Appellant, called the hotel to tell them that he would be picking up *his* package and once there, Brown, not Appellant, entered the hotel, picked up *his* package, and brought it back to the car. Because police had no information Appellant ever saw *Brown's* package, let alone knew what was inside of it, his mere presence at the scene was insufficient to provide police with probable cause for Appellant's warrantless arrest. The erroneous denial of the motion to suppress was not harmless beyond a reasonable doubt.

2. The trial court erred in denying Appellant's motion to suppress the texts recovered from his cell phone because the seizure of his phone was the fruit of the poisonous tree of his unconstitutional warrantless arrest. Moreover, the affidavit in support of the search warrant law enforcement procured to seize Appellant's phone, like the affidavits found deficient in

Baldwin and *Glover*, were wholly conclusory and failed to state probable cause. The affidavit failed to contain any facts connecting Appellant's phone to Brown's act of picking up *his* package, was silent as to whether Appellant's phone was used before, during or after the offense, and merely speculated that Appellant conspired with Brown. The erroneous denial of the motion to suppress was not harmless beyond a reasonable doubt.

3. The trial court abused its discretion in denying Appellant's motion for new trial alleging he was denied the effective assistance of counsel at the guilt-innocence stage. If this Court finds that the State is not judicially estopped from arguing that Appellant's constitutional complaints were not preserved, counsel's failure to preserve these meritorious claims, not to mention advancing a meaningful legal challenge to them, was objectively deficient conduct that was not, as counsel admitted, the result of any trial strategy. Counsel was also deficient in failing to object to inadmissible and prejudicial testimony that Appellant invoked his constitutional right to counsel and that Brown was so scared of Appellant that he hid behind a door and used sign language to communicate. Because these errors were sufficient to undermine confidence in the outcome of Appellant's trial, they were clearly calculated to prejudice Appellant.

ARGUMENT AND AUTHORITIES

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS

A. The standard of review on a motion to suppress evidence.

In reviewing a ruling on a motion to suppress, this Court applies a bifurcated standard of review.[78] This Court gives almost total deference to the trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor.[79] This is because the trial court is the sole finder of fact and is free to believe or disbelieve the testimony at the suppression hearing.[80] Because the trial court did not make explicit fact findings, this Court reviews the evidence in the light most favorable to the trial court's ruling and assumes that the trial court made implicit fact findings supported by the record.[81] Where, as here, the trial court's ruling does not turn on an evaluation of credibility and demeanor, this Court reviews de novo the ultimate determination of whether probable

---

[78] *State v. Hardin*, 664 S.W.3d 867, 871-72 (Tex.Crim.App. 2022).

[79] *Derichsweiler v. State*, 348 S.W.3d 906, 913 (Tex.Crim.App. 2011).

[80] *Wiede v. State*, 214 S.W.3d 17, 24-25 (Tex.Crim.App. 2007).

[81] *Ford v. State*, 158 S.W.3d 488, 493 (Tex.Crim.App. 2005).

cause existed for Appellant's arrest and whether the search warrant affidavit stated probable cause to search Appellant's cell phone.[82]

B. The "abuse of discretion" standard of review.

Suppression rulings are reviewed for an abuse of discretion.[83] That discretion is neither unbounded nor unfettered,[84] and does not insulate judicial rulings from meaningful appellate review.[85] But "discretion is not whim, and limiting discretion according to legal standards helps promote the basic principles of justice that like cases should be decided alike."[86] "A [trial] court by definition abuses its discretion when it makes an error of law"[87] or when "it fails to correctly analyze the law."[88]

"Abuse of discretion does not imply intentional wrong or bad faith, or misconduct, but means only an erroneous conclusion."[89] "'Abuse of

---

[82] *Lerma v. State*, 543 S.W.3d 184, 190 (Tex.Crim.App. 2018).

[83] *State v. Cortez*, 543 S.W.3d 198, 204 (Tex.Crim.App. 2018).

[84] *State v. Zalman*, 400 S.W.3d 590, 593 (Tex.Crim.App. 2013).

[85] *Montgomery v. State*, 810 S.W.2d 372, 392 (Tex.Crim.App. 1990)(op. on rehr'g).

[86] *Fleming v. Wilson*, 694 S.W.3d 186, 193 (Tex. 2024)(citations omitted).

[87] *Koon v. United States*, 518 U.S. 81, 100 (1996).

[88] *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018)(orig. proceeding).

[89] *Hebert v. State*, 836 S.W.2d 252, 255 (Tex.App.–Houston [1st Dist.] 1992, pet. ref'd).

discretion' is a phrase which sounds worse than it is. The term does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge."[90] The trial court lacks discretion to determine the law, to apply the law to the facts, or to misinterpret the law.[91]

C. Preservation of error and judicial estoppel.

This case presents a somewhat novel fact pattern that informs this Court's resolution of whether Appellant is entitled to a new trial based on the trial court's denial of his motion to suppress the narcotics seized as a result of his warrantless arrest and the texts seized from his cell phone. What makes this issue an outlier is that the positions taken by the parties at the motion for new trial hearing as to whether these complaints were preserved for appellate review – Appellant claiming they were not[92] while the State arguing that they were[93] – have been and will be jettisoned on appeal. What accounts for this stunning change? Put simply, if the State was correct that counsel preserved these constitutional claims, then this

---

[90] *United States v. Walker*, 772 F.2d 1172, 1176 n. 9 (5th Cir. 1985).

[91] *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995)(review for abuse of discretion is not "tantamount to no review at all").

[92] 6 RR 15, 19, 40, 42.

[93] 6 RR 25, 26, 30, 31, 35, 39.

Court must reach their merits. But given the State's well-founded fears that this Court will sustain these claims if it reaches their merits, it must make an abrupt U-turn because it knows the only way it can defend these indefensible Fourth Amendment violations is to play the "no preservation" card. But this Janus-like ploy is dead on arrival in this Court for a trio of reasons: (1) the State is judicially estopped from claiming these issues were not preserved; (2) counsel's often maladroit efforts preserved these issues; and (3) if this Court finds these issues were not preserved, it must sustain Appellant's ineffective assistance claim. The State's untenable, indeed, unwinnable position on error preservation calls to mind the words of President Lyndon Johnson when the Vietnam war took a turn for the worse: "I feel like a hitchhiker caught in a hailstorm on a Texas highway. I can't run, I cant' hide and I can't make it stop."[94]

1. Judicial estoppel precludes the State from claiming that counsel failed to preserve these constitutional challenges.

First, having prevailed in the trial court by arguing that counsel was

---

[94] TOM SHALES, "Vietnam," www.washingtonpost.com (October 2, 1983)(last visited Sept. 28, 2004). Because "[p]reservation of error is a systemic requirement that a first-level appellate court should ordinarily review on its own motion," *Haley v. State*, 173 S.W.3d 510, 515 (Tex.Crim.App. 2005), this Court's opinion on whether these critical issues are preserved is the only one that matters.

not ineffective because he preserved these constitutional challenges, the doctrine of judicial estoppel precludes the State from shifting gears by advancing a contrary argument before this Court. This doctrine:

- "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another."[95]
- "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."[96]
- "arises from positive rules of procedure based on justice and sound public policy."[97]
- "protects the integrity of the judicial process," by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," and preventing them from "playing 'fast and loose' with the courts."[98]
- "prevents the use of intentional, self-contradiction as a means of obtaining unfair advantage."[99]

As the Supreme Court has put it, this principle targets circumstances where "a party has succeeded in persuading a court to accept that party's

---

[95] *Pegram v. Herdich*, 530 U.S. 211, 227 n. 8 (2000).

[96] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)(citation omitted).

[97] *Davidson v. State*, 737 S.W.2d 942, 948 (Tex.App.– Amarillo 1987, pet. ref'd).

[98] *New Hampshire v. Maine,* 532 U.S. at 750 (citations omitted).

[99] *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 2 (Tex. 2008).

earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'"[100] The Court of Criminal Appeals has long used judicial estoppel to preclude the State from raising an argument contrary to one it had made and prevailed on in an earlier proceeding.[101]

The record shows that the State doubled down on counsel preserving these claims to convince the trial court that he was effective. The principle of judicial estoppel now mandates that the State may not "play fast and loose" in this Court by "deliberately changing positions according to the exigencies of the moment," "prevailing in one phase of a case on argument and then relying on a contradictory argument to prevail in [this Court]."[102]

2. Counsel preserved these constitutional challenges for review.

For a claim to be preserved, the record must show the complaining party's motion, objection or request was timely, specific, and subject to an

---

[100] *New Hampshire v. Maine,* 532 U.S. at 750 (citation omitted).

[101] *See e.g., Schmidt v. State*, 278 S.W.3d 353, 358 (Tex.Crim.App. 2009)(State was judicially estopped from taking position contrary to the one it prevailed on in prior proceeding).

[102] *New Hampshire v. Maine*, 532 U.S. at 749; *see also Rodriguez v. State*, 456 S.W.3d 271, 288 (Tex.App.– Houston [1st Dist.], 2014, pet. ref'd)(State was estopped from arguing that evidence did not raise issue of self-defense by proposing self-defense charge and "conduct[ing] itself as if it agreed that a fact issue [on self-defense] had been raised.").

adverse ruling.[103] While an objection must be made each time inadmissible evidence is offered,[104] two exceptions to this rule are where counsel is given a running objection or requests a hearing outside the jury's presence.[105]

Appellant's challenges were preserved for review. First, by ordering Appellant's motion to suppress be carried with the trial,[106] the trial court directed Appellant to wait until all the evidence was presented before he obtained any ruling from the trial court.[107] "Appellant was reasonable to interpret [the trial court's] comments as an instruction to seek a ruling at the conclusion of the State's presentation of evidence, and not sooner."[108] Second, the trial court gave Appellant a running objection to the admission of the texts seized from his cell phone.[109] Third, Appellant's objection to the

---

[103] *See generally* Tex. R. App. P. 33.

[104] *Martinez v. State*, 98 S.W.3d 189, 193 (Tex.Crim.App. 2003).

[105] *Geuder v. State*, 115 S.W.3d 11, 13 (Tex.Crim.App. 2003).

[106] 2 RR 13-14.

[107] *See Garza v. State*, 126 S.W.3d at 84.

[108] *Id.*

[109] 3 RR 110-11. *See Sattiewhite v. State*, 786 S.W.2d 271, 283 (Tex.Crim.App. 1989)(error was preserved when the defendant was given a running objection to evidence relating to extraneous offenses even though the defendant's objection "was not in the best form").

admission of the drugs outside the jury's presence[110] obviated the necessity of having to renew his objections when this evidence was admitted before the jury.[111]

Much can be said about the word salad nature of counsel's objections if this Court finds these constitutional complaints were waived. But given the mandate that the "standards of procedural default ... are not to be implemented by splitting hairs in the appellate courts," this Court "should reach the merits of [these] complaints without requiring that [Appellant] read some special script to make [his] wishes known."[112]

3. If these Fourth Amendment violations were not preserved, this Court must sustain Appellant's ineffective assistance of counsel claim.

As recounted below, because Appellant's Fourth Amendment claims were meritorious, this Court is compelled to sustain them and reverse his convictions so long as they were preserved. But, if the State convinces this Court that the equitable doctrine of judicial estoppel does not preclude it

---

[110] 3 RR 169.

[111] *Cf. Haley v. State*, 173 S.W.3d at 517, citing, Tex. R. Evid. 103(a)("When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.").

[112] *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992).

from changing horses in midstream and snatching victory from the jaws of defeat based on waiver, this Court must nonetheless sustain Appellant's ineffective assistance of counsel claim.[113]

D. Insufficient probable cause for Appellant's warrantless arrest.[114]

"The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated."[115] This "right to be secure in their persons" guarantees the reasonable expectation of privacy to all persons, whether in their homes or on the street, and applies to arrests conducted without a warrant.[116] Under the Fourth Amendment, a warrantless arrest is usually unreasonable *per se* unless the arrest fits into one of a "few specifically defined and well delineated exceptions."[117]

As a matter of Texas law, warrantless arrests are permitted only in limited circumstances and largely governed by Chapter Fourteen of the

---

[113] *See e.g., Dryer v. State*, 674 S.W.3d at 651 (counsel's failure to preserve meritorious challenge to extraneous offense denied the defendant the effective assistance of counsel).

[114] While the State argued below why the search warrant affidavit for Appellant's phone was sufficient to state probable cause, tellingly, it never even attempted to defend the legitimacy of Appellant's warrantless arrest.

[115] U.S. Constitution, AMEND. IV.

[116] *Paulea v. State*, 278 S.W.3d 861, 864 (Tex.App.– Houston [14th Dist.] 2009, pet. ref'd).

[117] *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

Code of Criminal Procedure:[118]

- Article 14.01(b) which authorizes a warrantless arrest for an offense committed in the officer's presence or within his view;

- Article 14.03(a)(1) which authorizes a warrantless arrest of "persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony"; and

- Article 14.04 which authorizes a warrantless arrest "where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape."[119]

In Texas, "a police officer must have both probable cause *with respect to the person being arrested*, plus statutory authority to make that arrest."[120] To establish probable cause for such an arrest, the State must show that "at that moment [of the arrest] the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense."[121] A police

---

[118] *Amores v. State*, 816 S.W.2d 407, 413 (Tex.Crim.App. 1991).

[119] Each of these statutory provisions require the legal equivalent of constitutional probable cause. *Id.* at note 9.

[120] *Parker v. State*, 206 S.W.3d 593, 596 (Tex.Crim.App. 2006)(emphasis in original); *see generally* Tex. Code Crim. Proc. arts. 14.01-14.04 (listing situations under which a police officer may arrest a person without an arrest warrant).

[121] *Id.*, quoting, *State v. Steelman*, 93 S.W.3d 102, 107 (Tex.Crim.App. 2002).

officer's unarticulated hunch, suspicion, or good faith is insufficient to support probable cause to justify a warrantless arrest.[122] Speaking for the court, the late Judge Cathy Cochran emphasized that when an appellate court reviews the constitutional propriety of a warrantless arrest, it must bear in mind that:

> There is, of course, a significant difference between the notion that there is probable cause to believe that *someone* has committed an offense and probable cause to believe that this particular person has committed an offense. *Probable cause to arrest must point like a beacon toward the specific person being arrested.* Second, the police officer who lacks a warrant to arrest must have statutory authority to make such a warrantless arrest.[123]

This holding compels the conclusion that the State did not shoulder its burden of demonstrating that probable cause existed for Appellant's warrantless arrest. The record from the suppression hearing reveals that at the time Officer Cauley arrested Appellant, the only facts known to him as regards Appellant – not Dalton Brown – were limited to the following:

- Law enforcement intercepted a package containing 4.8 kilograms of

---

[122] *Id*

[123] *Parker v. State*, 206 S.W.3d at 597 (initial emphasis in original); *see also Torres v. State*, 182 S.W.3d 899, 901 (Tex.Crim.App. 2005)("A police officer may arrest an individual without a warrant only if probable cause exists with respect to the individual in question and the arrest falls within one of the exceptions set out in Tex. Code Crim. Proc. art 14.01-14.04.").

ketamine destined to be delivered to Lisa Pimbley at a Holiday Inn and arranged a controlled delivery of it to the Holiday Inn.[124]

- Dalton Brown – not Appellant – called the Holiday Inn to tell them that "his" package containing the ketamine had been sent to the wrong hotel and that he would be picking it up.[125]

- Arriving at the Holiday Inn, Brown – not Appellant – entered the hotel, picked up the package, and brought it back to the car that Appellant was driving.[126]

- Cauley had no information that Appellant ever saw the package let alone knew what was inside of it.[127]

Even when the evidence is viewed in the light most favorable to the trial court's ruling, it falls far short of the constitutionally-mandated burden the State bore of proving that Appellant's warrantless arrest was supported by probable cause *and* that it fell within one of the exceptions set out in Chapter Fourteen of the Code of Criminal Procedure.[128]

First and foremost, as the Court of Criminal Appeals has made clear, "probable cause *must point like a beacon toward the specific person* being

---

[124] 3 RR 98-99.

[125] 3 RR 98-99.

[126] 3 RR 98-99; 179.

[127] 3 RR 185.

[128] *See Amores v. State*, 816 S.W.2d at 414-16.

arrested."[129] Make no mistake: at the time of Appellant's arrest, and on the facts known to Cauley, this beacon shone on Dalton Brown alone and not Appellant. Second, while Cauley certainly had probable cause to believe that *someone* committed an offense on December 9, 2022 when the officers swooped in to arrest Appellant and Brown, that "someone" was not Appellant but Brown, the "significant difference" between believing that probable cause existed that "someone" committed an offense and probable cause to believe that this particular person has committed an offense.[130]

Once again, Judge Cochran's teachings illuminate this Court's path in its less than onerous journey to determining why Appellant's arrest ran afoul of the Fourth Amendment and Chapter Fourteen:

> [S]uppose Officer Obie walks up the aisle of the Astrodome and smells the strong odor of burnt marihuana emanating from the stands. He would be reasonable in concluding that *someone* in the stands has been smoking marihuana and that is a criminal offense. But that does not mean that Officer Obie has probable cause to arrest *everyone* in the Astrodome (or even all of those in that particular section) for possession of marihuana.[131]

Substitute Officer Cauley for Officer Obie, the Holiday Inn parking

---

[129] *Parker v. State*, 206 S.W.3d at 597. (emphasis added).

[130] *Id.*

[131] *Id.* at note 11 (emphasis added).

lot for the Astrodome, and the package Brown picked up for marihuana. It does not take this Court long to find that while it would be reasonable for Cauley to conclude that *someone* – Brown – had committed a crime, but that did not mean Cauley had probable cause to arrest *everyone* – Brown *and* Appellant. The State not only failed to shoulder its burden of showing that probable cause existed for Appellant's arrest, it failed to show which exception to the constitutional and statutory prohibitions against warrantless arrests in Chapter Fourteen applied.[132]

The closest the State came to bearing either burden was its naked assertion, one belied by this record, the jury charge,[133] and controlling case law[134] that Appellant "was a party to this act."[135] But, the State's wishful thinking cannot supply the necessary nexus between a citizen accused and constitutionally mandated probable cause because the Court of Criminal

---

[132] *See Amores v. State*, 816 S.W.2d at 414-16 (holding that warrantless arrest was invalid where the State failed to carry its burden of demonstrating which of the exceptions set out in Chapter Fourteen applied).

[133] CR 85 ("Mere presence alone will not constitute one a party to an offense."); CR 80 ("Statements made by the lawyers are not evidence.").

[134] *Cf., Amores v. State*, 816 S.W.2d at 416 (officer lacked probable cause to arrest defendant without a warrant where " the officer did not observe anything at the scene which can be objectively be considered criminal conduct...").

[135] 3 RR 171.

Appeals has made it clear that "[w]e will not engage in conjecture as to the existence of facts which are critical to a finding of probable cause."[136] And the Supreme Court presaged this sentiment fifty-five years ago, opining that, "The demand for specificity in the information upon which police action is predicated is the central teaching of ... Fourth Amendment jurisprudence."[137] Moreover, that Cauley later learned of other facts that tended to connect Appellant to the drugs is of no moment in the resolution of this complaint. The Court Criminal Appeals made it clear four decades ago that the State may not avail itself of this *post hoc* ploy to breathe life into a warrantless arrest that fails to meet the constitutional requirement of probable cause:

> In reviewing a warrantless arrest to determine the existence of probable cause, we look to the facts known to the officers at the time of the arrest; subsequently discovered facts or later-acquired knowledge, like the fruits of a search, cannot retrospectively serve to bolster probable cause at the time of the arrest.[138]

---

[136] *Amores v. State*, 816 S.W.2d at 415.

[137] *Terry v. Ohio*, 392 U.S. 1, 21 n. 18 (1968).

[138] *Colston v. State*, 511 S.W.2d 10, 13 (Tex.Crim.App. 1974); *see also Atkins v. State*, 919 S.W.2d 770, 774 (Tex.App.– Houston [14th Dist.] 1996, no pet.)("Subsequently discovered facts or later-acquired knowledge, like the fruits of a search, cannot retrospectively serve to bolster probable cause at the time of the arrest.").

The trial court's legal conclusion that the State carried its burden of showing that probable cause existed for Appellant's warrantless arrest, which this Court reviews *de novo*,[139] is foreclosed by an unbroken line of authority concluding that probable cause for a warrantless arrest failed to meet constitutional muster on facts where, as here, "Any indication that a crime had been committed is visibly missing from the facts,"[140] and even on facts stronger than those in this case:

- "Considering the evidence, including reasonable inferences, all [the officer] knew was that the car upon which appellant was seen sitting was possibly connected with an abduction and sexual assault. ... [Police] may have had probable cause to believe the car was involved in the offense but nothing to show appellant was involved."[141]

- Warrantless arrest was unsupported by probable cause where the facts did not indicate "in any way" that the suspect "had committed a burglary or possessed stolen property in the officers' presence."[142]

- Probable cause for warrantless arrest was lacking where defendant's "mere propinquity to another independently suspected of criminal activity does not, without more, give rise to probable cause..."[143]

---

[139] *Kothe v. State*, 152 S.W.3d 54, 61 (Tex.Crim.App. 2004)("On appeal, the question of whether a specific search or seizure is "reasonable" under the Fourth Amendment is subject to *de novo* review.").

[140] *Jones v. State*, 746 S.W.2d 281, 284 (Tex.App.– Houston [1st Dist.] 1988, pet. ref'd).

[141] *Farmah v. State*, 883 S.W.2d 674, 679 (Tex.Crim.App. 1994).

[142] *Hoag v. State*, 728 S.W.2d 375, 379 (Tex.Crim.App. 1987).

[143] *Bell v. State*, 845 S.W.2d 454, 460 (Tex.App.– Austin 1993, no pet.).

- Where all police knew was that the defendant left a location known to police as a hotbed of narcotics activity and made a series of furtive gestures, warrantless arrest was unsupported by probable cause.[144]

- While the officer had reasonable suspicion for his "overly aggressive detention," in the absence of any information that the defendant had committed an offense, his warrantless arrest was unsupported by probable cause even though the defendant fled from police.[145]

- Police lacked probable cause for warrantless arrest where the evidence failed to show that he committed a crime in their presence.[146]

- Warrantless arrest was invalid where the evidence showed "no more than a general suspicion of appellant's connection to the crime, which falls far short of probable cause to arrest appellant."[147]

- Officer's conclusory opinion about the defendant's intoxication failed to provide probable cause for his warrantless arrest.[148]

- Warrantless arrest of the defendant inside a private residence was unsupported by probable cause where police lacked particularized information that the defendant, as opposed to anyone else inside the residence, had committed a crime.[149]

As the Supreme Court observed almost seventy-five years ago, it is

---

[144] *Marcopoulos v. State*, 538 S.W.3d 596, 601 (Tex.Crim.App. 2017).

[145] *Burkes v. State*, 830 S.W.2d 959, 960-61 (Tex.App.– Tyler 1992, no pet.)(per curiam).

[146] *Stull v. State*, 772 S.W.2d 449, 452-53 (Tex.Crim.App. 1989).

[147] *Carey v. State*, 695 S.W.2d 306, 311 (Tex.App.– Amarillo 1985, pet. ref'd).

[148] *Torres v. State*, 182 S.W.3d at 903.

[149] *State v. Steelman*, 93 S.W.3d at 109.

a hallmark of Fourth Amendment jurisprudence that "[A] search is not to be made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success."[150] The Court of Criminal Appeals has echoed this sentiment, making it clear, "A detention" or for that matter, an arrest "is either good or bad at the moment it starts."[151]

Three equally-obvious principles emerge from these fundamental tenets, controlling case law, and this record. First, Appellant's warrantless arrest, as noted above, was bad from the moment Cauley took Appellant into custody. Second, the search that yielded the contraband forming the basis for Appellant's prosecution and conviction, hard on the heels of his unlawful warrantless arrest, was no less constitutionally infirm and did not change character from its success. Third, because Appellant's arrest was unlawful, the seizure of his cell phone was the fruit of that unlawful arrest and subject to suppression under the terms of the statute governing the issuance of warrants to search a cell phone.[152]

---

[150] *United States v. Di Re*, 332 U.S. 581, 595 (1948).

[151] *State v. Duran*, 396 S.W.3d 563, 569-70 (Tex.Crim.App. 2013).

[152] *See* Tex. Code Crim. Proc. art. 18.0215(a)("A peace officer may not search a person's cellular telephone or other wireless communications device, pursuant to a *lawful arrest* of the person without obtaining a warrant under this article.")(emphasis added).

E. The Fourth Amendment's Warrant Clause, the standard for probable cause, and a reviewing court's responsibility.

The core of the Fourth Amendment's Warrant Clause and its Texas equivalent is that a magistrate may not issue a search warrant without first finding "probable cause" that a particular item will be found in a particular location.[153] The test is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a "substantial basis" for issuing the warrant.[154] Probable cause exists when, under the totality of the circumstances, there is a "fair probability" that contraband will be found at the specified location.[155] Neither federal nor Texas law defines precisely what degree of probability suffices to establish probable cause, but a magistrate's action cannot be a mere ratification of the bare conclusions of others.[156] A magistrate should not be a rubber stamp. "In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously

---

[153] *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex.Crim.App. 2007); U.S. CONST. amend IV; Tex. Const. art I, § 9.

[154] *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984).

[155] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[156] *Id.* at 239.

review the sufficiency of affidavits on which warrants are issued.[157]

Trial and appellate courts apply a highly deferential standard when reviewing a magistrate's decision to issue a warrant because of the constitutional preference for searches to be conducted pursuant to a warrant.[158] A reviewing court must read the affidavit in a common sense, realistic manner, recognizing that the magistrate may draw reasonable inferences and deferring to all reasonable inferences that a magistrate could have made.[159] But, "a magistrate may not baselessly presume facts that the affidavit does not support"[160] because he may not "read into the document material information that does not otherwise appear on its face."[161] Because what is "[n]otable is what the affidavit and attachments presented to the magistrate [in this case] *do not* reveal,"[162] the trial court clearly erred in finding that the affidavit stated probable cause.

F. The requirements for obtaining a warrant to search a cell phone.

---

[157] *Id.*; *see also State v. Duarte*, 389 S.W.3d 349, 354 (Tex.Crim.App. 2012).

[158] *Foreman v. State*, 613 S.W.3d 160, 164 (Tex.Crim.App. 2020).

[159] *Id.*

[160] *Id.*

[161] *Cassias v. State*, 719 S.W.2d 585, 590 (Tex.Crim.App. 1986).

[162] *Taylor v. State*, 54 S.W.3d 21, 24 (Tex.App.– Amarillo 2001, no pet.)(emphasis added).

To search a cell phone after a *lawful* arrest, Texas law requires that a peace officer must submit an application for a warrant to a magistrate.[163] The application must:

> state the facts and circumstances that provide the applicant with probable cause to believe that (A) criminal activity has been, is, or will be committed; and (B) searching the telephone or device is likely to produce evidence in the investigation of the criminal activity described in Paragraph (A).[164]

The Court of Criminal Appeals has held that generic, boilerplate language about cell phone use among criminals is insufficient to establish probable cause to search the phone under Art. 18.0215(c)(5).[165] Speaking for the majority, Judge Jesse McClure opined:

> specific facts connecting the items to be searched to the alleged offense are required for the magistrate to reasonably determine probable cause. To hold otherwise would condone the search of a phone merely because a person is suspected to have committed a crime with another person. Put another way, all parties suspected of participating in an offense would be subject to having their cell phones searched, not because they used their phones to commit the crime, but merely

---

[163] Tex. Code Crim. Proc. art. 181.0215(a)ACCESS TO CELLULAR TELEPHONE OR OTHER WIRELESS COMMUNICATIONS DEVICE. A peace officer may not search a person's cellular telephone or other wireless communications device, pursuant to a lawful arrest of the person without obtaining a warrant under this article.

[164] Tex. Code Crim, Proc., art. 181.0215(c)(5).

[165] *State v. Baldwin*, 664 S.W.3d 122, 134 (Tex.Crim.App. 2022).

because they owned cell phones.[166]

The court concluded that there were no facts within the four corners of the affidavit that tied the defendant's cell phone to the offense because there "was no information [in the affidavit] included that suggest anything beyond mere speculation that [Baldwin's] cell phone was used before, during, or after the crime."[167] That affidavit's fatal flaw, the failure to state sufficient probable cause to establish a nexus between criminal activity and Baldwin's cell phone based on a factual narrative of "nothing more than mere suspicion,"[168] is the identical imperfection that eviscerates the validity of the affidavit in this proceeding.

G. The factual assertions in the affidavit are conclusory and failed to provide the magistrate with a substantial basis for concluding that probable cause existed to search Appellant's cell phone.

The Achilles' heel of this affidavit is the inconvenient truth that

---

[166] *Id.*

[167] *Id.* Appellant recognizes that the Court of Criminal Appeals recently held that *Baldwin* does not "necessarily require" "as a prerequisite of probable cause, that an affidavit must establish (1) use of the cell phone either during, or immediately before or after, commission of (2) the specific offense on trial." *Stocker v. State*, 693 S.W.3d 385, 388 (Tex.Crim.App. 2024)(directing the court of appeals to reexamine its decision relying on *Baldwin* to conclude that the search warrant affidavit utilized to obtain incriminatory evidence from the defendant's cell phone was deficient). But given the consequential gaps on the search warrant affidavit in this case, the State can find no safe harbor in the court's summary grant and remand in *Stocker*.

[168] *Id.*, citing, *Tolentino v. State*, 638 S.W.2d 499, 502 (Tex.Crim.App. 1982).

because the factual assertions in the affidavit are conclusory,[169] they could not have provided the magistrate with a substantial basis for concluding probable cause that evidence of a crime would be found on Appellant's cell phone. Simply stated, there is no nexus to Appellant's cell phone and any criminal activity as required by the court in *Baldwin*.[170]

There are no facts in the affidavit that connect Appellant's cell phone to Brown's act of picking up the package. The affidavit is silent as to whether Appellant's cell phone was used "before, during, or after" the offense. Indeed, it is pure speculation and wholly conclusory to allege that Appellant "conspired" with Brown because Appellant was merely the driver of the vehicle with no apparent knowledge about the contents of the package. And, while law enforcement may have suspected Appellant was part of some criminal transaction, this affidavit's rote recitations turn a blind eye to what the Supreme Court made clear almost fifty years ago: The critical element in a reasonable search *is not that the owner of the*

---

[169] *Cf. Dolcefino v. Randolph*, 19 S.W.3d 906, 930 (Tex.App.– Houston [14th Dist.] 2000, pet. den'd)("A conclusory statement ... does not provide the underlying facts to support the conclusion.").

[170] This tenet is hardly novel. The Fifth Circuit embraced this mandate some four decades before *Baldwin*. "Facts must exist in the affidavit which establish a nexus between the [property] to be searched and the evidence sought." *United States v. Freeman*, 685 F.2d 942, 949 (5th Cir. 1982)(quotation marks and citation omitted).

property is suspected of crime but that there is reasonable cause to believe that the specific "'things" to be searched for and seized are located on the property to which entry is sought. It does not follow ... that probable cause for arrest would justify the issuance of a search warrant or, on the other hand, that probable cause for a search warrant would necessarily justify an arrest.[171]

The affidavit's transparent and ultimately unsuccessful attempt to state probable cause relied on this jurisprudential analog of cubic zirconia:

- Appellant's alleged "inability to state that he was just giving Brown a ride,"
- "statements of conspiracy made by [Brown] which implicate [Appellant's] involvement," and
- Appellant's "previous identification as a drug trafficker using federal law enforcement intelligence."

As the Texas Supreme Court has recognized in a similar vein, these assertions are patently conclusory, devoid of any evidentiary value, and lack a reasoned basis because a reviewing court cannot simply credit any witness who simply says, "Take my word for it."[172] What exactly does it

---

[171] *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 & n. 6 (1978)(emphasis added).

[172] *Burrow v. Arce*, 997 S.W.2d 229, 236 (Tex. 1999).

mean that Appellant was unable to say that "he was just giving Brown a ride"? Appellant didn't want to? He was nervous? His English isn't great? He was in a state of shock after being confronted with a veritable armada of peace officers with their guns pointed at his head?

Appellant's purported posture as an alleged "drug trafficker" fares no better in providing probable cause to seize his cell phone absent any discernible nexus between Appellant, his cell phone, and the narcotics. Indeed, these very types of global generalizations have been consistently found *not* to provide the requisite nexus between a defendant and the object of the search.[173] As one appellate court has concluded in a similar context rejecting this identical tall and unsatisfying legal tale:

> The requirement that an affidavit provide a nexus between the contraband and the residence to be searched would mean very little if this generalization gave probable cause to search the residence of every drug user. Such a per se rule would render the Fourth Amendment's probable cause analysis for search warrants virtually meaningless.[174]

---

[173] *See e.g., Ex parte Perry*, 814 So.2d 840, 843 (Ala. 2001)(evidence that defendant was a drug dealer, without more, did not provide probable cause for a warrant to search his house); *State v. Thein*, 977 P.2d 582, 590-91 (Wash. 1999)(same); *Yancey v. State*, 44 S.W.3d 315, 323-24 (Ark. 2001)(defendants' watering marijuana plants in the woods did not provide probable cause to search their homes for marijuana); *State v. Johnson*, 578 N.W.2d 75, 82 (Neb.Ct.App. 1998)(drugs found in defendant's possession during traffic stop, without more, did not provide probable cause for a warrant to search the defendant's residence).

[174] *Cunningham v. Comm.*, 643 S.E.2d 514, 519-20 (Va.Ct.App. 2007).

If this Court substitutes "cell phone" for "residence," it is clear that the mere assertion Appellant was "a drug trafficker" was not a magical talisman that provided probable cause to search his cell phone.[175]

Moreover, as for the avowal that Brown allegedly made "statements of conspiracy" that implicated Appellant, this claim is similarly conclusory because it fails to provide any underlying facts that support it. It does not state what Brown said, when, and to whom. Notably, it does not state how or why the magistrate could reasonably find a discernible nexus between what Brown allegedly said and why evidence of a crime could be found on Appellant's cell phone.

The affidavit in this case is no stronger than, indeed, is weaker than the one that this Court has only recently held failed to pass constitutional muster in *Glover v. State.*[176] Like the affidavit in this case, the facts in the search warrant affidavit that police used to search the defendant's phone in *Glover* were not only conclusory but pock-marked by "the dearth of facts

---

[175] *United States v. Brown*, 828 F.3d 375, 382-83 (6th Cir. 2016) (rejecting the government's claim that the defendant's status as a "known drug dealer" gave probable cause to search his home); *State v. Doile*, 769 P.2d 666, 671-72 (Kan. 1989)(defendant's possession of drugs in his car, along with his previous conviction for selling cocaine, did not provide probable cause to search his home).

[176] 695 S.W.3d 829 (Tex.App.– Houston [1st Dist.] 2024, no pet.).

about the crime and the cell phone's connection to that crime."[177] Relying on *Baldwin*, and two court of appeals' opinions, [178] this Court held that the "affidavit failed to provide the magistrate with a substantial basis for determining that probable cause existed to search Glover's cell phone."[179]

Even affording the magistrate's decision substantial deference, the purely conclusory averments in this affidavit suffer from the same malady as the affidavit in *Glover* that this Court found constitutionally deficient. Both affidavits are quintessential examples of what reviewing courts have long condemned as a "bare bones" affidavit "that states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge [that] fails to establish probable cause."[180]

As in *Glover*, the conclusory averments in this bare-bones affidavit are mere "suspicion and conjecture [that] do not constitute probable

---

[177] *Id.* at 834.

[178] *Id.* at 836, citing *Elardo v. State*, 163 S.W.3d 760, 766 (Tex.App.– Texarkana 2005, pet. ref'd) and *Barraza v. State*, 900 S.W.2d 840, 842 (Tex.App.– Corpus Christi-Edinburg 1995, no pet.).

[179] *Id.* (citations omitted).

[180] *United States v. West*, 520 F.3d 604, 610 (6th Cir. 2008); *see also Glover v. State*, 695 S.W.3d at 836 (noting the inherent infirmity in "bare-bones" affidavits).

cause."[181] They present "too many gaps ... to be filled with guess, hope, and surmise when attempting to infer" the existence of probable cause[182] because "this Court and the magistrate who issued the warrant were left to guess at the nexus, if any, between the matter described in the affidavit and criminal activity."[183] The clearly conclusory averments in the affidavit could not have given the magistrate a substantial basis for concluding that probable cause existed to search Appellant's cell phone.[184]

Because the magistrate was not free to fill in the consequential gaps in the affidavit by "read[ing] into the document material information that does not otherwise appear on its face,"[185] his issuance of the warrant was, essentially, the "mere ratification of the bare conclusions" of the affiant, the quintessential example of "the limits beyond which a magistrate may not venture in issuing a warrant."[186] The patent constitutional violation

---

[181] *Tolentino v. State*, 638 S.W.2d at 502.

[182] *Lowery v. State*, 98 S.W.3d 398, 402 (Tex.App.– Amarillo 2003, no pet.).

[183] *Cardona v. State*, 134 S.W.3d 854, 859 (Tex.App.– Amarillo 2004, pet. ref'd).

[184] *See State v. Baldwin*, 664 S.W.3d at 135.

[185] *Cassias v. State*, 719 S.W.2d at 590; *Avilez v. State*, 796 S.W.2d 240, 242 (Tex.App. – Houston [14th Dist.] 1991, pet. dism'd)(no corroboration of facts set out in affidavit).

[186] *Illinois v. Gates*, 462 U.S. 213, 239 (1983). Given the absence of Baldwin from counsel's file, it is hardly surprising that his file also failed to contain a copy of Art. 181.0215(c)(5) that

presented by this purely conclusory, speculation-laden narrative affidavit calls to mind the sentiments expressed by the Austin Court of Appeals:

> [W]ere we to conclude that the types of statements quoted above could legitimately serve as a basis for a probable-cause determination, then the law-enforcement net would become so wide that it would be able to ensnare virtually any citizen at any time for any reason, and the constitutional protections prohibiting unreasonable searches would effectively be rendered meaningless. Whatever powers may be imbued with the judicial pen, it cannot blot out one of the foundational rights of this country and this State.[187]

H. The myriad text messages recovered from Appellant's cell phone as a result of his illegal warrantless arrest and the invalid search warrant were the fruit of the poisonous tree.

The "fruit of the poisonous tree" doctrine serves to exclude as evidence not only the direct products of Fourth Amendment violations, but also indirect products.[188] That law enforcement would not have discovered the text messages on Appellant's phone that formed the heart and soul of the prosecution's cases without first unlawfully arresting him and then searching his cell phone on the strength of the defective search warrant is clear. That the text messages the State utilized to convict Appellant are

---

outlines the requirements for obtaining a warrant to search a suspect's cell phone.

[187] *Kennedy v. State*, 338 S.W.3d 84, 100 (Tex.App.– Austin 2011, no pet.)(op. on remand).

[188] *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *State v. Iduarte*, 268 S.W.3d 544, 55-51 (Tex.Crim.App. 2008).

the fruit of the poisonous tree is equally clear because the taint of this initial illegality was not sufficiently dissipated.[189] The nexus between the execution of the invalid warrant to search Appellant's cell phone and the discovery and admission of the incriminatory text messages is direct and unattenuated.[190] The causal connection between the initial illegality of law enforcement unlawfully searching Appellant's cell phone, discovering the torrent of inculpatory texts on it, and admitting them at trial to secure his convictions was direct, unbroken, and wholly devoid of any intervening circumstances sufficient to purge the taint of the initial illegality.[191]

I. These two consequential constitutional errors were not harmless beyond a reasonable doubt.

The trial court's erroneous denial of Appellant's motion to suppress the fruits of his warrantless arrest and the text messages seized from his

---

[189] *Wilson v. State*, 277 S.W.3d 446, 449-50 (Tex.App.– San Antonio 2008), *aff'd*, 311 S.W.3d 452 (Tex.Crim.App. 2010)(defendant's confession was fruit of the poisonous tree where taint of initial illegality was not "so far removed from obtaining the confession that the causal chain was in fact broken").

[190] *See Sossamon v. State*, 816 S.W.2d 340, 349 (Tex.Crim.App. 1991), *abrogated on other grounds* by *Graham v. State*, 994 S.W.2d 651 (Tex.Crim.App. 1991)(suppressing witness's in-court identification obtained from defendant's illegal arrest where "the nexus between the witnesses and appellant's improperly induced confession is direct and unattenuated.").

[191] *See Martinez v. State*, 620 S.W.3d 734, 744 (Tex.Crim.App. 2021)(Appellant's statement was the fruit of his illegal arrest and "nothing broke the causal connection between the illegal arrest and the statement.").

cell phone is constitutional error.[192] This standard requires this Court to reverse these convictions unless it determines beyond a reasonable doubt that the erroneous denial of Appellant's motion to suppress did not contribute to his convictions.[193] This standard "should ultimately serve to vindicate the integrity of the fact-finding process rather than simply looking to the justifiability of the fact-finder's result."[194] In conducting its harmless analysis, this Court must focus "not upon the perceived accuracy of the conviction or punishment, but upon the error itself in the context of the trial as a whole, in order to determine the likelihood that it genuinely corrupted the fact-finding process."[195]

This Court's focus is not on "whether the jury verdict was supported by the evidence" but whether "the error adversely affected the integrity of the process leading to the conviction."[196] This Court does not focus on

---

[192] Tex. R. App. P. 44.2(a) *Constitutional Error*. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

[193] *See Hernandez v. State*, 60 S.W.3d 106, 108 (Tex.Crim.App. 2001)(Rule 44.2(a) harm analysis applies where evidence is erroneously admitted in violation of the Fourth Amendment).

[194] *Snowden v. State*, 353 S.W.3d 815, 820 (Tex.Crim.App. 2011).

[195] *Id.*

[196] *Langham v. State*, 305 S.W.3d 568, 582 (Tex.Crim.App. 2010)(quotation omitted).

the weight of the other evidence of guilt, but rather on whether the error at issue might possibly have prejudiced the jurors' decision-making.[197] Constitutional error is not harmless "simply because the reviewing court is confident that the result the jury reached was objectively correct."[198]

Factors this Court considers include the nature of the error, whether it was emphasized by the State, the probable implications of the error, and the weight the jury would have likely assigned to it in the course of its deliberations.[199] This Court must review this record in a neutral, impartial and even-handed manner to determine if this error contributed to the convictions, and does not examine the record in the light most favorable to the verdict.[200] If this Court is unsure whether the error affected the outcome, it should treat the error as harmful.[201]

These critical constitutional errors were not harmless beyond a

---

[197] *Friend v. State*, 473 S.W.3d 470, 482 (Tex.App.– Houston [1st Dist.] 2015, pet. ref'd). While the State argued below that the texts from Brown's phone rendered any error in the admission of his texts harmless, 6 RR 37-38, this assertion proves too much. Because Appellant's texts were pivotal as recounted above, they were obviously calculated to prejudice the jurors' decision-making.

[198] *Snowden v. State*, 353 S.W.3d at 819.

[199] *Friend v. State*, 473 S.W.3d at 482.

[200] *Id.* at 483.

[201] *United States v. Lane*, 474 U.S. 438, 449 (1986).

reasonable doubt. The drugs forming the basis for Appellant's conviction and the texts seized from his phone are the "fruit of the poisonous tree" of law enforcement's misconduct.[202] And, the State focused extensively on the fruits of these unconstitutional actions in its final argument in urging jurors to convict Appellant.[203] Emphasis in final argument is a compelling barometer that the error was not harmless beyond a reasonable doubt.[204] This is especially true where, as here, the State's emphasis on it occurs in the rebuttal portion of summation prior to deliberations.[205] Given this repeated emphasis on the erroneously admitted text messages, jurors likely placed great weight on the error, another factor indicating these constitutional errors were not harmless beyond a reasonable doubt.[206]

---

[202] *See Glover v. State*, 695 S.W.3d at 837-38 (citations omitted).

[203] *Id.*

[204] *See Love v. State*, 543 S.W.3d 835, 857-58 (Tex.Crim.App. 2016)(admission of texts was not harmless beyond a reasonable doubt where State repeatedly alluded to them in final argument).

[205] *See Erazo v. State*, 167 S.W.3d 889, 890-91 (Tex.App.– Houston [14th Dist.] 2005, no pet.)(op. on remand)(erroneously admitted photograph about which "the State imparted its final thoughts to the jury just before its deliberations" affected substantial rights); *Brown v. State*, 978 S.W.2d 708, 715 (Tex.App.– Amarillo 1998, pet. ref'd)("[T]he harm arose immediately before the jury was to retire and deliberate. Thus, its potential effect was not as attenuated as it would have been had the misconduct occurred elsewhere.").

[206] *See Scott v. State*, 227 S.W.3d 670, 694 (Tex.Crim.App. 2007)(because jurors probably placed great weight on the erroneously admitted evidence given the State's repeated emphasis on it during final argument, the error was not harmless beyond a reasonable doubt).

Finally, because the incriminatory texts recovered from Appellant's cell phone and the drugs seized from his warrantless arrest were the heart and soul of the State's case, the probable implications of these errors "move[d] the jury from a state of non-persuasion to one of persuasion," indicating they were not harmless beyond a reasonable doubt.[207] Because these grave errors "served as the tipping point for the jury's guilty verdict," they are not harmless beyond a reasonable doubt.[208]As the Court of Criminal Appeals has stressed, "Although we are slow to overturn the verdict of a jury, when fundamental constitutional protections are violated, however innocently, we must uphold the integrity of the law."[209]

The Fourth Amendment "safeguard[s] the privacy and security of individuals against arbitrary invasions by government officials."[210] Because this constitutional mandate protects the privacy, security, and dignity of any citizen who is the victim of an illegal seizure, "Under a long

---

[207] *Sanchez v. State*, 383 S.W.3d 211, 216 (Tex.App.– San Antonio 2012, no pet.).

[208] *Friend v. State*, 473 S.W.3d at 486.

[209] *McCarthy v. State*, 65 S.W.3d 47, 56 (Tex.Crim.App. 2001).

[210] *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

line of our decisions, the tie must go to [Appellant]."[211] As one appellate tribunal has held, "A decision contrary to the one we reach today would considerably weaken the Fourth Amendment protections against unreasonable governmental intrusions into constitutionally safeguarded areas of our lives,"[212] a bedrock safeguard that extends to all defendants.[213]

The judgments of conviction entered below must be reversed, and the causes remanded for proceedings not inconsistent with this opinion.

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR NEW TRIAL

A. The standard of review for the denial of a motion for new trial.

The trial court's ruling on a motion for new trial is reviewed under the abuse of discretion standard.[214] When, as here, the trial court makes no findings of fact on the denial of a motion for new trial, this Court "impute[s] implicit factual findings that support the trial court's ultimate

---

[211] *State v. Cortez,* 543 S.W.3d at 210 (Newell, J., *concurring*), *citing United States v. Santos,* 128 S. Ct. 2020, 2025 (2008)(Scalia, J.).

[212] *Smith v. State*, 58 S.W.3d 784, 793 (Tex.App.–Houston [14th Dist.] 2001, pet. ref'd).

[213] *See Le v. Mullin*, 311 F.3d 1002, 1029 (10th Cir. 2002)("If we allow justice to strike foul blows, even at a deserving target, we cheapen a virtue by clothing it in a vice.").

[214] *State v. Herndon*, 215 S.W.3d 901, 907 (Tex.Crim.App. 2007). Appellant incorporates by reference pp. 19-20, *supra.*

ruling."[215] But there is a limitation on imputing factual findings: this Court will only impute implicit factual findings that "are both reasonable and supported in the record."[216]

B. The standard of review for ineffective assistance of counsel claims.

Appellant was entitled to the effective assistance of counsel at the guilt-innocence stage of his trial.[217] To be entitled to a new trial based on an ineffective assistance of counsel claim, Appellant must first show that trial counsel's conduct was objectively deficient because it fell below an "objective standard of reasonableness ... under prevailing professional norms."[218] "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case."[219]

Counsel must have a firm command of the facts and law governing

---

[215] *Johnson v. State*, 169 S.W.3d 223, 239 (Tex.Crim.App. 2005).

[216] *Escobar v. State*, 227 S.W.3d 123, 127 (Tex.App.– Houston [1st Dist.] 2006, pet. ref'd).

[217] *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex.Crim.App. 1986).

[218] *Strickland v. Washington*, 466 U.S. 668, 698 (1984). "Prevailing norms of practice as reflected in the American Bar Association standards and the like ... are guides to what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005)("[W]e have long referred [to these ABA Standards] as guides to determining what is reasonable.").

[219] 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, commentary pp. 4-5.

the case before he can render effective assistance.[220] Counsel "must be sufficiently abreast of developments in criminal law aspects implicated in the case at hand" and "ignorance of well-defined general laws, statutes, and legal propositions is not excusable and ... may lead to a finding of constitutionally deficient assistance of counsel."[221] For counsel's actions to be deficient, "the specific legal proposition" which he failed to assert must be "well considered and clearly defined."[222]

"It may not be argued that challenged conduct was within the realm of trial strategy unless counsel has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision."[223] Conduct informed by counsel's misunderstanding of the law is "a quintessential example of unreasonable performance under *Strickland*."[224]

Appellant must also demonstrate that counsel's deficient conduct

---

[220] *Ex parte Welborn,* 785 S.W.2d 391, 393 (Tex.Crim.App. 1990).

[221] *Ex parte Lane*, 670 S.W.3d 662, 671 (Tex.Crim.App. 2023)(quotation omitted).

[222] *Id.*

[223] *Id.*; *see also Wiggins v. Smith*, 539 U.S. at 523 ("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision.").

[224] *Hinton v. Alabama*, 571 U.S. 263, 274 (2014)(per curiam).

was prejudicial – but for counsel's errors, there is a reasonable probability that the outcome would have been different.[225] This Court's principal concern is whether Appellant was afforded a fair trial resulting in an outcome worthy of confidence.[226] The prejudice he must demonstrate is by less than a preponderance of the evidence; "[t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different."[227] Even a single error by counsel can warrant a finding of ineffective assistance if it was of such magnitude that it rendered the trial fundamentally unfair.[228]

C. Strategic decisions informed by an unreasonable investigation or a misunderstanding of the law are unworthy of deference.

"It may not be argued that a given course of conduct was within the realm of trial strategy unless and until [defense counsel] has conducted

---

[225] *Strickland v. Washington*, 466 U.S. at 692.

[226] *Kyles v. Whitley*, 514 U.S. 419, 430 (1995).

[227] *United States v. Dominguez Benitez*, 542 U.S. 74, 82 n. 9 (2004); *see also Strickland v. Washington*, 466 U.S. at 694-96 ("The result of a proceeding can be rendered unreliable, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").

[228] *See e.g., Dryer v. State*, 674 S.W.3d 635, 651 (Tex.App.– Houston [1st Dist.] 2023, pet. ref'd)(counsel's failure to object to extraneous offense was deficient conduct that was prejudicial).

the necessary legal and factual investigation which would enable him to make an informed rational decision."[229] Any trial "strategy" that flows "from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel."[230] If, as this record clearly reflects, counsel's errors were driven by his misunderstanding of the law or by his failure to conduct a reasonable legal or factual investigation, it cannot be considered an objectively reasonable trial strategy.[231]

Because "tactical" decisions are entitled to deference only if they are *informed* decisions, this Court's "principal concern" is not whether counsel's challenged conduct was strategic, "but rather whether the investigation supporting [his] decision... *was itself reasonable* [because] *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision..."[232] The Supreme Court has stressed that "decision[s] cannot be fairly characterized as 'strategic' unless [they were] a conscious choice between two legitimate and rational alternatives ...

---

[229] *Ex parte Welborn*, 785 S.W.2d at 395.

[230] *Kenley v. Armentrout*, 937 F.2d 1198, 1304 (8th Cir. 1991).

[231] *Ex parte Welborn*, 785 S.W.2d at 395.

[232] *Wiggins v. Smith*, 539 U.S. at 522-23 (emphasis in original).

borne of deliberation and not happenstance, inattention, or neglect."[233]

Sound strategy is informed by a reasonable investigation into the facts and the law.[234] "A decision that counsel defends as trial strategy might nonetheless be objectively unreasonable; the magic word 'strategy' does not insulate a decision from judicial scrutiny."[235] Because there is a "crucial distinction between strategic judgments and plain omissions,"[236] this Court is "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all."[237]

When, as here, counsel admits his challenged conduct was not the

---

[233] *Id.* at 526-27.

[234] *Freeman v. State*, 167 S.W.3d 114, 117 (Tex.App.–Waco 2005, pet. ref'd).

[235] *Ex parte Saenz*, 491 S.W.3d 819, 829 (Tex.Crim.App. 2016); *see also Caballero v. State*, 695 S.W.3d at 485 ("The State further argues that defense counsel's failure to admit to inadequate investigation and inadequate interviews of potential witnesses and failure to explain why he failed to do these things require this Court to presume a strategic reason for his inaction. We do not agree that the applicable standard of review insulates counsel's performance to the degree the State asserts.").

[236] *Loyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992).

[237] *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999); *see also Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987)(*Strickland* does not require deference to decisions which do not yield any conceivable benefit to the defense).

product of a sound trial strategy, his admissions are entitled to great weight.[238] As an officer of the court, counsel's sworn assertions are entitled to great deference.[239] Moreover, "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."[240] And, because these admissions were "so far contrary to [counsel's] pecuniary or proprietary interest,"[241] they are entitled to even greater weight.[242]

---

[238] *See e.g., Ex parte Overton*, 444 S.W.3d 632, 640 (Tex.Crim.App. 2014)(counsel admitted he was "completely ineffective"); *Ex parte Saenz*, 491 S.W.3d at 828 (counsel admitted his failure to impeach key eyewitness was "a mistake" and not a strategic decision) *Ex parte Varelas*, 45 S.W.3d 627, 633 (Tex.Crim.App. 2001)(counsel admitted his failure to request key jury instructions limiting consideration of extraneous offenses and burden of proof was "not the result of any trial strategy"); *Ex parte Ybarra,* 629 S.W.2d 943, 953 n. 29 (Tex.Crim.App. 1982)(trial counsel admitted, "I did not give [the accused] effective counsel."); *Fulton v. State*, 576 S.W.3d 905, 917 (Tex.App.– Tyler 2019, pet. ref'd)(counsel admitted his failure to impeach critical witness or offer exculpatory evidence "was not based on trial strategy").

[239] *See e.g., Holloway v. Arkansas*, 435 U.S. 475, 486 (1978)(counsel's admissions under oath entitled to "great deference"); *White v. Reiter*, 640 S.W.2d 586, 599 (Tex.Crim.App. 1982) (counsel's representations "entitled to great deference"and the court is "compelled to defer to them unless there is no factual support for them"); *Hartsell v. State*, 143 S.W.3d 233, 234 (Tex.App.– Waco 2004, no pet.)(presuming truth of counsel's representation in motion to dismiss appeal).

[240] Texas Disciplinary Rules of Professional Conduct, § 3.03(a)(1); *United States v. Marks*, 949 S.W.2d 320, 327 (Tex. 1997)(citing Rule 3.03 to accept veracity of counsel's statements).

[241] *See* Tex. R. Evid. 803(24)(recognizing hearsay exception where the declarant would have made the statement "only if [he] believed it to be true because, when made, it was so contrary to [his] proprietary or pecuniary interest" or "to expose [him] to civil ... liability" or "to make [him] an object of ... disgrace..").

[242] *See e.g., Caballero v. State*, 695 S.W.3d at 485-86 (crediting counsel's admission in his affidavit that he had no strategic reason for failing to present evidence critical to his defensive theory of self-defense that the victim was shot from an upstairs window).

D. The factual assertions in the affidavit are conclusory and failed to provide the magistrate with a substantial basis for concluding that probable cause existed to search Appellant's cell phone.[243]

E. Counsel's failure to mount a meaningful challenge to the search warrant affidavit was objectively unreasonable.[244]

The lack of relevant case law in counsel's file, especially, the seminal decision in *Baldwin* fortifies the age-old axiom that every battle is won or lost before it's ever fought.[245] Handling a suppression hearing in this case without *Baldwin* at one's disposal is like doing Hamlet without Hamlet. And, it's not as if locating *Baldwin* would have taken any effort at all: had counsel simply typed "Texas case law on cell phone search warrants" into Google, the very first hit he would have seen was a link to *Baldwin*.[246] But, counsel never did this because he delegated the task of compiling research for the suppression hearing to a novice lawyer with no knowledge of Texas criminal law, procedure, or evidence as her work product reveals.[247]

---

[243] Appellant incorporates by reference pp. 39-46, *supra*.

[244] Appellant incorporates by reference pp. 39-46, *supra*.

[245] SUN TZU, The Art of War 83.

[246] https://law.justia.com/cases/text/court-of-criminal-appeals/2022/pd-0027-21.html (last visited October 14, 2024).

[247] MNT 3.

Counsel's tactic – "a lie was told to obtain the search warrant" – lacked evidentiary support in this record and was a strategy that he failed to execute. The research counsel had in his file – assuming he read it – alerted him to the fact that it was his burden to request a pretrial *Franks* hearing to prove the search warrant affidavit contained materially false statements.[248] But counsel not only failed to request a *Franks* hearing, he failed to seek suppression of the warrant on this basis.[249] Called on to explain just what this lie was, let alone why he was entitled to the relief he sought, counsel's "argument" was a classic non-starter.

Counsel's woefully incomplete and ultimately unsuccessful attempt to suppress the most consequential evidence admitted by the State against Appellant, one driven by a clearly unreasonable legal investigation, is "a quintessential example of unreasonable performance under *Strickland.*"[250] This Court's determination that counsel's conduct that he admitted was

---

[248] *See Franks v. Delaware*, 438 U.S. 154 (1978).

[249] Called on to explain just what this lie was, let alone why he was entitled to the relief that he sought, counsel argued without any legal support: "The lie that Brown had indicated – implicated this defendant in this particular scheme, and that's what was placed in the search warrant. *And the law is very clear* that such – in such a case and that all the – the messages that was derived from this, that has been shown to this jury, has prejudiced this jury against this defendant." 3 RR 170 (emphasis added)(sic in passim).

[250] *Hinton v. Alabama*, 571 U.S. at 274.

not the product of any trial strategy meets the first prong of *Strickland* is not onerous.[251] To be sure, the trial court was free to disbelieve counsel's admission that there was no strategic basis for his failure to investigate and present what would have been a meritorious challenge to the validity of the affidavit. But to be equally sure, this Court has only recently held that when it "cannot conceive of *any reasonable trial strategy* that would support the actions or inactions of counsel, then counsel's performance is deficient."[252] Because no conceivable trial strategy can support counsel's conduct, this Court is constrained to hold that it was deficient.[253]

F. Counsel's failure to mount a meaningful challenge to Appellant's warrantless arrest was objectively unreasonable.[254]

By the time counsel finally sought to suppress the drugs seized as a result of Appellant's warrantless arrest, the drugs and the results of the lab report had been admitted without objection. The totality of counsel's

---

[251] *See e.g., Perkins v. State*, 771 S.W.2d 195, 198 (Tex.App.– Houston [1st Dist.] 1989, aff'd, 812 S.W.2d 326, 329 (Tex.Crim.App. 1991)(counsel's failure to file motion to suppress illegal arrest constituted ineffective assistance of counsel); *Boyington v. State*, 738 S.W.2d 704, 708 (Tex.App.– Houston [1st Dist.] 1985, no pet.)(counsel's failure to challenge defendant's warrantless arrest was objectively deficient performance).

[252] *Caballero v. State*, 695 S.W.3d at 487 (emphasis added).

[253] *Id.*

[254] Appellant incorporates by reference pp. 26-35, *supra.*

argument challenging the legality of Appellant's arrest consisted of the following four sentences:

> At this time, Judge, *I'm going to ask that you suppress all the drugs that have been introduced in this case.*[255]
>
> First of all, I want to renew my objection based upon the fact that it [sic] was obtained from an illegal arrest. There was probable cause to arrest the defendant.[256] He – in Galveston County on December 9th, 2022, he was acting lawfully.

That's it. Counsel did not call a single witness, cite a single case, or otherwise amplify his boilerplate argument in spite of the fact that it was his burden to create a record sufficient to warrant the suppression of the drugs.[257] Counsel's failure to adequately investigate and present what was a meritorious challenge to the validity of Appellant's arrest[258] and search of his cell phone pursuant to a search warrant affidavit that failed to state probable cause[259] constituted objectively deficient performance.

---

[255] (emphasis added). The irony, if not futility, of counsel asking the trial court to suppress evidence that had been admitted without objection was apparently lost on counsel, not to mention the State at the motion for new trial hearing.

[256] It is apparent from the context of counsel's argument that the court reporter apparently misheard what counsel had said.

[257] *Russell v. State*, 717 S.W.2d 7, 9 (Tex.Crim.App. 1986).

[258] Appellant incorporates by reference pp. 26-35, *supra.*

[259] Appellant incorporates by reference pp. 39-46, *supra.*

Counsel's conduct was objectively unreasonable on two levels: first, he failed to investigate and present a timely and meritorious challenge to Appellant's warrantless arrest; second, even if counsel had done so, he waived any conceivable challenge by failing to object to the drugs and the contents of the lab report when they were offered. Because counsel's challenged conduct was animated by his failure to conduct a meaningful factual investigation, and his misunderstanding of the applicable law, this Court is compelled to conclude that it was objectively deficient.[260]

G. If this Court finds that counsel failed to preserve these meritorious constitutional claims for review, his conduct was objectively deficient.

As recounted above, whether counsel preserved these consequential constitutional claims for review is of no moment. If they were preserved, Appellant is entitled to a new trial based on either or both of these Fourth Amendment violations; if they were not, a new trial is warranted based on this Sixth Amendment violation. As discussed above, while the State, as the party who prevailed below, is judicially estopped from contending that

---

[260] *See Caballero v. State,* 695 S.W.3d at 486-87 (counsel's failure to present evidence critical to his defensive theory of self-defense that the victim was shot from an upstairs window based on his failure to conduct a thorough legal and factual investigation was objectively deficient); *see also Perkins v. State*, 771 S.W.2d at 198 (counsel's failure to file motion to suppress illegal arrest constituted ineffective assistance of counsel); *Boyington v. State*, 738 S.W.2d at 708 (counsel's failure to challenge defendant's warrantless arrest was objectively deficient performance).

these constitutional challenges were not preserved, Appellant, who did not prevail in the trial court, is not precluded from arguing they were.[261]

H. Counsel's elicitation of inadmissible and prejudicial testimony from Officer Cauley that Dalton Brown incriminated Appellant during a jail house interview constituted objectively deficient conduct.

I. Counsel's elicitation of inadmissible and prejudicial testimony from Officer Cauley that Dalton Brown was so fearful of Appellant that he hid behind a door and used sign language so Appellant would not know what Brown was doing constituted objectively deficient conduct.

During the State's direct examination of Officer Cauley, counsel took him on voir dire regarding information Cauley put in the search warrant and elicited the following testimony:

- Dalton Brown implicated Appellant during a jailhouse interview he conducted with Cauley.[262]
- Brown was extremely fearful of Appellant and so reluctant to speak with Cauley that he was trying to hide behind a door and was mostly using hand gestures and head nods when referring to Appellant.[263]

Counsel had an ethical duty to "present all available evidence and arguments" to support his client's defense in the guilt-innocence stage,[264]

---

[261] *New Hampshire v. Maine,* 532 U.S. 742, 750 (2001)(judicial estoppel applies only to the party who prevailed below; *Schmidt v. State*, 278 S.W.3d 353, 358 (Tex.Crim.App. 2009)(same).

[262] 3 RR 109.

[263] 3 RR 109.

[264] *Jackson v. State*, 857 S.W.2d 678, 683 (Tex.App.– Houston [14th Dist.] 1993, pet. ref'd).

and to "subject the State's case to the test through vigorous partisan advocacy."[265] He was obligated to conduct a reasonable investigation and present any readily available evidence that tended to show Appellant's innocence, bolstered his defensive theory, undermined the State's case, or raised a reasonable doubt regarding Appellant's guilt.[266] The evidence counsel elicited from Cauley did not come close to meeting this mandate and "it is difficult to imagine how the testimony could fail to be harmful to [Appellant]."[267] Counsel's injudicious decision to elicit this prejudicial evidence was not just a violation of his ethical and professional duties, but constituted objectively deficient conduct as well.

J. Counsel's failure to object when the State elicited inadmissible and prejudicial testimony of Appellant's invocation of his right to counsel following his arrest constituted objectively deficient performance.

During the State's direct examination, Officer Cauley testified that after Dalton Brown and Appellant were arrested, the next thing that he did in his investigation "would [be to] start trying to conduct criminal interviews or get information from them." The following exchange then

---

[265] *Haynes v. Cain*, 272 F.3d 757, 764 (5th Cir. 2001).

[266] *Ex parte Amezquita*, 223 S.W.3d 363, 368 (Tex.Crim.App. 2006).

[267] *Boyington v. State*, 738 S.W.2d at 708.

transpired without any objection from counsel:

> Q: [By the State] And did either individual agree to have an interview with you?
>
> A: Dalton did. [Appellant] wanted a lawyer. So we never conducted an interview with [Appellant].[268]

It is a fundamental tenet of Texas criminal law and procedure that the introduction at trial of evidence of the defendant's invocation of his right to silence and counsel is clearly inadmissible.[269] Counsel's failure to recognize this basic principle permitted the State to elicit inadmissible and prejudicial testimony and constituted objectively deficient conduct.[270]

K. Counsel's series of critical errors prejudiced Appellant.

In determining if Appellant was prejudiced by counsel's errors in connection with the motion to suppress, he need not show the trial court would have granted the motion but for these errors. He need only show

---

[268] 3 RR 104. The State's argument at the motion for new trial hearing that Appellant having had the Fifth Amendment right not to talk to police after receiving his *Miranda* warnings "doesn't mean that we can't talk about it," 6 RR 32-33, reveals a basic, indeed, troubling misunderstanding of the constitutional protections in both the Fifth Amendment and *Miranda*.

[269] *See e.g., Lajoie v. State*, 237 S.W.3d 345, 353 (Tex.App.– Fort Worth 2007, no pet.)("We believe that presenting the jury with this evidence certainly could lead to a decision on an improper basis, i.e., anyone who immediately and repeatedly asks for an attorney must be guilty. As such, this evidence had a tendency to be given undue weight by the jury."). Notably, counsel's motion in limine did not seek to keep the State from eliciting this inadmissible and prejudicial testimony. MNT 16.

[270] *See e.g., Walker v. State*, 195 S.W.3d 250, 261 (Tex.App.– San Antonio 2006, no pet.) (counsel's failure to object to inadmissible and prejudicial testimony was objectively deficient).

by less than a preponderance of the evidence that there is a reasonable probability that the trial court would have reached a different result. This is so because "[t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different."[271] *Strickland* does "not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome" only that he establish "a probability sufficient to undermine confidence in [the] outcome."[272]This Court has made clear that a prejudice analysis "is more than the simple evaluation of the sufficiency of the evidence."[273] Counsel's unprofessional errors were more than sufficient to prejudice Appellant.[274]

First, it is axiomatic that even a single error on counsel's part may warrant a finding of prejudice.[275] And where, as here, that single error is

---

[271] *United States v. Dominguez Benitez*, 542 U.S. at 82 n. 9.

[272] *Porter v. McCollum*, 130 S.Ct. 447, 455-56 (2009)(per curiam).

[273] *Caballero v. State*, 695 S.W.3d at 488.

[274] While the State argued below that Appellant was not prejudiced because jurors saw the texts from Brown's phone, 6 RR 37-38, this assertion proves too much. Because Appellant's texts were pivotal to the State's case as set out above, they made its case significantly more persuasive, the touchstone of prejudice under *Strickland*. *See* pp. 49-51 & notes 197-208, *supra*.

[275] *See e.g., Frangias v. State*, 450 S.W.3d 125, 136 (Tex.Crim.App. 2013)(one error was sufficient to warrant finding of ineffective assistance); *Branch v. State*, 335 S.W.3d 893, 904

the admission of the contraband forming the basis for this conviction itself and the admission of a torrent of texts that were the heart and soul of the prosecution's case, the State's rote rejoinder that Appellant has failed to demonstrate prejudice is unsupported and unsupportable.[276]

Second, while each instance of counsel's errors is a discrete incident, its effects permeated the guilt-innocence stage.[277] While each deficiency standing alone might not warrant a finding of prejudice, taken together, under the cumulative error standard this Court employs, the whole of counsel's deficient conduct is greater than the sum of its parts.[278]

Third, the State's allusion to the texts recovered from Appellant's phone in summation to urge the jury to convict is compelling evidence of

---

(Tex.App.– Austin 2011, pet. ref'd)("The dissent suggests that the defense attorneys' failure to object ... could be overlooked because by and large, [they] rendered effective assistance ... throughout the trial. However, the court of criminal appeals has stated otherwise."); *Ex parte Felton*, 815 S.W.2d 733,736 (Tex.Crim.App. 1991)(one error was sufficient to undermine confidence in trial's outcome).

[276] *See e.g., Frangias v. State*, 413 S.W.3d 212, 224 (Tex.App.– Houston [14th Dist.] 2013, no pet.)(op. on remand)(citation omitted)(counsel's single error was prejudicial where it "had a pervasive effect on the inferences to be drawn from the evidence, altering the evidentiary picture.").

[277] *See Caballero v. State*, 695 S.W.3d at 489 (finding prejudice where counsel's objectively deficient conduct "permeated the entire trial").

[278] *See e.g., Brown v. State*, 974 S.W.2d 289, 294 (Tex.App. – San Antonio 1998, pet. ref'd)(counsel's multiple instances of deficient conduct "undermines this court's confidence in the conviction"); *Greene v. State*, 928 S.W.2d 119, 126 (Tex.App.–San Antonio 1996, pet. ref'd) ("although each mistake standing alone is not ineffective assistance of counsel, when all of [counsel's] mistakes are taken together this court's confidence in the result is undermined.").

prejudice.[279] This prejudice is even greater where this plea was among the last thing that the jury heard before deciding Appellant's fate.[280] Indeed, during voire dire, Juror No. 38, who was unchallenged,[281] and served on this jury,[282] described text messages as "solid evidence" that would show the defendant's "intention of selling [drugs] or doing something."[283]

Fourth, the prejudicial impact of counsel's failure to mount what would have been a meritorious challenge to the spate of texts is also reflected by the jury's request to see some of them shortly before they convicted Appellant.[284]

Fifth, because the State's evidence was not overwhelming – indeed, Brown was acquitted because *his* lawyer rendered effective assistance –

---

[279] *See Ex parte Saenz*, 491 S.W.3d 491 at 833 (State's emphasis on counsel's errors in final argument compelling evidence of prejudice); *Dryer v. State*, 674 S.W.3d at 652 (State's repeated emphasis on improperly admitted extraneous offense in summation was compelling evidence that counsel's deficient conduct was prejudicial).

[280] *Cf. Hall v. State*, 283 S.W.3d 137, 177-78 (Tex.App.– Austin 2009, pet. ref'd)(defendant harmed by admission of improper evidence where it was one of the final things jurors heard).

[281] MNT 18 & 19.

[282] MNT 20.

[283] MNT 17.

[284] *See Guilbeau v. State*, 193 S.W.3d 156, 161 (Tex.App.– Houston [1st Dist.] 2006, pet. ref'd)(jury note asking why no self-defense instruction was given was ample evidence that defendant was prejudiced by absence of such an instruction).

counsel's errors were acutely prejudicial as the Supreme Court has noted:

> Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated, trivial effect. Moreover, *a verdict or conclusion only weakly supported by the evidence is more likely to have been affected by errors than one with overwhelming record support.*[285]

Sixth, and perhaps most important, because counsel's multiplicity of errors, especially his failure to suppress the throng of incriminatory text messages or the contraband itself went directly to the ultimate issue in this case – whether Appellant knowingly and intentionally possessed the contraband as a party. Accordingly, counsel's deficient performance made the prosecution's case significantly more persuasive while it made the defense's significantly less persuasive, the hallmark of prejudice.[286]

While this Court cannot say with certainty whether the trial court would have granted the motion to suppress the texts or the drugs, or one juror would have struck a different balance as to guilt or innocence, given counsel's serious errors, *Strickland* makes it clear that certainty is not the standard that this Court employs. The "reasonable probability" *Strickland*

---

[285] *Strickland v. Washington*, 466 U.S. at 695-696 (emphasis added).

[286] *See Kyles v. Whitley*, 514 U.S. at 430; *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995).

embodies does not require certainty, let alone a showing it is "more likely than not" that a different outcome would have occurred in connection with the resolution of the suppression issues, determination of guilt.[287] Because counsel's critical errors necessarily undermine this Court's confidence in the outcome of this trial, it is compelled to sustain this point of error.[288]

CONCLUSION AND PRAYER

Appellant prays that this Court sustain these points of error, reverse the judgments of conviction below, and remand the causes for a new trial, or alternatively, for further proceedings not inconsistent with its opinion.

RESPECTFULLY SUBMITTED,

/s/ BRIAN W. WICE

BRIAN W. WICE
The Lyric Centre
440 Louisiana Suite 900
Houston, Texas 77002-1635
(713) 524-9922 PHONE
(713) 236-7768 FAX
TBA NO. 21417800
wicelaw@att.net
ATTORNEY FOR APPELLANT

---

[287] *See Porter v. McCollum*, 130 S.Ct. at 455-56.

[288] *See e.g., Ex parte Saenz*, 491 S.W.3d at 833(counsel's deficient conduct was sufficient to undermine court's confidence in the trial's outcome) *Ex parte Overton*, 444 S.W.3d at 641(same); *Caballero v. State*, 695 S.W.3d at 489 (same); *Dryer v. State*, 674 S.W.3d at 653 (same).

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5(d), I certify that this brief was served upon opposing counsel, the Galveston County District Attorney's Office, by e-filing on October 29, 2024.

/s/ BRIAN W. WICE

BRIAN W. WICE

CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(1)(i)(1), and *Appellant's Unopposed Motion to Exceed Word Count* being contemporaneously filed, I certify that this document complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(D):

Exclusive of the exempted portions in Rule 9.4(i)(1), this document contains 16,296 words, prepared in proportionally spaced typeface using Word Perfect 8.0 in Century 14 for text and Times New Roman 12 for footnotes.

/s/ BRIAN W. WICE

BRIAN W. WICE