No. 14-24-00474-CR

In the Fourteenth Court of Appeals
Houston, Texas

MATHEW TIMOTHY JONES,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 184th Judicial District Court
Harris County, Texas
Katherine N. Thomas, Judge Presiding
In Cause No. 1788585

APPELLANT'S OPENING BRIEF

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184th Judicial District Court
Harris County, Texas

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To the Honorable Court of Appeals:

This case is about *proof*—of elements, enhancements, pleas, and costs. The case against Mathew Jones suffered in each category.

STATEMENT OF THE CASE

Jones was charged with murder—both 1) by intentionally and knowingly causing the death of an individual, and 2) by intending to cause serious bodily injury and committing an act clearly dangerous to human life that caused the death of an individual.[1] Tex. Penal Code § 19.02(b)(1), (2). The indictment also alleged two sequential prior felony convictions as enhancement paragraphs.[2] Tex. Penal Code § 12.42(d).

Jones pleaded not guilty, but a jury convicted him.[3] At the end of the punishment hearing, the trial court found both enhancement paragraphs true and sentenced Jones to 75 years' confinement.[4] Tex. Penal Code § 12.42(d). This appeal follows.

[1] Clerk's Record (CR) 49 (amended indictment), 404–07 (motion to amend indictment and order granting motion); Reporter's Record volume (RR) 4:18.

[2] CR:49, 404–07.

[3] CR:427; RR4:19; RR6:197.

[4] CR:427; RR7:123.

STATEMENT REGARDING ORAL ARGUMENT

40 years ago, when the Court of Criminal Appeals was still thinking in terms of old-penal-code cases, *Aguirre* declared that section 19.02 lists alternative ways of committing murder. The Court has since come to grips with the modern code and how to properly construe it. Yet it has never revisited its mistaken construction of the murder statute to acknowledge what recent case law demands: the statute defines separate offenses with different elements.

But, in 2020, the U.S. Supreme Court held that jury unanimity is part of the Sixth Amendment right to a jury trial. Unanimity is now a federal constitutional issue. Unanimity error, which deprives a defendant of his jury-trial right, is now structural error.

Texas courts have not had to wrestle with this new development very much. This Court has one case pending, *Solis v. State*, No. 14-23-00789-CR, that raises this issue, but *Solis* was transferred to this Court, so this Court will not decide that case based on this Court's own precedent. Tex. R. App. P. 41.3. And this Court's precedent has propagated *Aguirre*'s mistaken construction of the murder statute. No court should lightly overrule its own precedent, but that is what Jones is asking this Court to do. We should talk about that. Accordingly, oral argument will significantly aid this Court's decisional process. Tex. R. App. P. 39.1(d).

Issues Presented

1. **Jury Charge—Unanimity.** The Sixth Amendment jury-trial right includes the right to a unanimous jury verdict with respect to every element. The jury charge in this case did not require the jury to be unanimous as to whether Jones committed the elements of murder under (b)(1) or (b)(2). Did the charge deny Jones his right to a unanimous jury?

2. **Enhancement Sequence—Legal Sufficiency.** To enhance a felony under sec. 12.42(d), the State must prove two prior consecutive final felony convictions. In this case, the State proved that both felonies were committed before either conviction became final. Is the evidence legally insufficient to prove the enhancement sequence?

3. **Judgment—Plea to Enhancements.** The judgment recites that Jones pleaded true to the enhancements, but the record does not show that Jones entered a plea to the enhancements at all. It does show that he pleaded not guilty to the indictment and contested the enhancement paragraphs at trial. Should this Court modify the judgment to reflect that Jones did not plead to the enhancements or that his plea was not true?

4. **Judgment—Cost Assessment.** A cost may not be assessed for a service that is not performed. The judgment assesses costs for 17 subpoenas that were not served. Should this Court remove $85 from the assessed costs?

5. **Bill of Costs—Costs Not Yet Payable.** The judgment orders Jones to pay costs upon release from confinement, but the bill of costs makes the costs payable now. Should this Court delete the not-yet-payable costs from the bill of costs?

STATEMENT OF FACTS

The girls arrive.

On the morning of September 23, 2022, four "dancers"—Taylor Johnson, Brionna McIntyre, Janay Purdy, and Alexandria Salyer—got off work and went to a stretch of Bissonnet Street in Southwest Houston so that Brionna and Janay could "make extra cash."[5]

They went in two cars: Janay rode with Brionna, and Alexandria with Taylor.[6] They parked at a tire shop on Bissonnet just west of a Burger King.[7] Brionna and Janay got out and started walking up the sidewalk toward the Burger King.[8]

The BMW drives up.

As they walked along the sidewalk, a silver BMW drove up alongside them.[9] The driver, who was alone and wearing a white shirt, rolled down his window and "tried to holler" at them.[10] Brionna got "a good look" at the driver's face.[11] Brionna and Janay kept walking,

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[5] RR4:82–83, RR5:239, 242, 306–07; RR6:35.

[6] RR4:85.

[7] RR4:86; RR5:308.

[8] RR4:87; SE 90, ch. 3 at 00:55, ch. 4 at 00:55.

[9] RR4:87.

[10] RR4:88, 93, 103–04; RR8:138–41 (SE 47–48); SE 35, video 3 at 10:15 (7:53:58 AM).

[11] RR4:88.

eventually turning south on Plainfield Street, which runs alongside the Burger King.[12]

The BMW continued east on Bissonnet.[13] It then went south on Plainfield, where it briefly pulled up alongside a girl in a denim bikini, and another girl, who were both standing at the rear entrance of the Burger King parking lot.[14]

Detail of State's Exhibit 4, showing Bissonnet Street (at the top), Plainfield Street (on the right), and the Burger King (with the red pin).

An argument begins.

The girl in the denim bikini "approached" Brionna and Janay on Plainfield, and there was a "heated exchange" of words.[15] The BMW returned and drove by on Plainfield before heading west on Bissonnet.[16]

Taylor and Alexandria left the tire-shop parking lot, and Taylor drove

[12] RR4:94; RR8:16–17 (SE 4).

[13] SE 35, video 3 at 10:37 (7:54:19 AM).

[14] SE 35, video 2 at 4:10 (7:55:09 AM).

[15] RR4:89; RR5:258.

[16] SE 35, video 2 at 4:58 (7:55:57 AM), video 3 at 13:25 (7:57:07 AM).

up Bissonnet to Plainfield, where Alexandria got out of the car and "jumped in" to the verbal altercation.[17]

The BMW pulled into the Burger King parking lot, and a man in a white t-shirt and dark baseball cap walked over to the front of the drive-thru area.[18] Brionna identified this man as the driver of the BMW, and she described the girl in the denim bikini as "his girl."[19]

The girl in the denim bikini walked back from the same area, still agitated, making gestures and yelling.[20] She returned and yelled some more before the man walked her back.[21] About a minute later, the man and girl returned, and the argument continued.[22] During the argument, the girl in the denim bikini made "threats … of a serious nature" toward Alexandria.[23]

Watching from her car, Taylor noticed the man in the white t-shirt with the girl in the denim bikini.[24] She thought they seemed to

[17] RR5:244, 245–48; SE 35, video 3 at 14:28 (7:58:09 AM).

[18] SE 35, video 3 at 17:09 (8:00:50 AM), 17:35 (8:01:16 AM).

[19] RR4:104.

[20] RR5:60–61, 73–74; SE 35, video 3 at 17:48 (8:01:29 AM).

[21] SE 35, video 3 at 18:09 (8:01:51 AM), 19:07 (8:02:48 AM).

[22] SE 35, video 3 at 20:13 (8:03:54 AM).

[23] RR5:300.

[24] RR5:249, 252–53; RR8:126–27 (SE 41), 130–31 (SE 43).

know each other.[25] She yelled at Alexandria, Brionna, and Janay, trying to get them to shut up and calm down.[26]

The girls leave.

Alexandria got back in the car, and Taylor drove south down Plainfield while Alexandria shouted out the front passenger window.[27] Taylor then turned around, came back, and pulled into the parking lot, where Brionna and Janay got in the car.[28] They were all still angry, and Alexandria was still yelling.[29]

Taylor drove through the parking lot to the front entrance on Bissonnet.[30] While she was stopped at the entrance, Alexandria got out of the car and yelled at the girl in the denim bikini again.[31] At

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[25] RR5:253.

[26] RR5:250–51.

[27] RR:251; SE 35, video 2 at 13:54 (8:04:53 AM).

[28] RR5:251–52; SE 35, video 2 at 14:45 (8:05:43 AM). Taylor claimed at trial that she saw the man in the white t-shirt get into the BMW in the Burger King parking lot. RR5:255. Video shows that the BMW was already in motion when Taylor pulled into the parking lot. SE 35, video 2 at 14:54 (8:05:52 AM). Taylor later admitted that she didn't know the BMW was in the parking lot when she was trying to get Brionna and Janay in the car. RR5:259.

[29] RR5:252.

[30] RR4:96, RR5:253; SE 35, video 2 at 15:14 (8:06:12 AM), video 3 at 22:46 (8:06:27 AM).

[31] RR4:97; RR5:55–97, 93–94; SE 35, video 3 at 23:04 (8:06:45 AM).

almost the exact same time, the BMW left the Burger King parking lot via the rear exit and turned north onto Plainfield.[32]

The driver of the BMW chases them and shoots.

After Alexandria got back in the front passenger seat of the car, Taylor turned east onto Bissonnet and made a U-turn at the red light to head back toward the tire shop.[33]

As she made the U-turn, the BMW turned onto Bissonnet behind her; it caught up with her and pulled up along the passenger side.[34] Brionna heard the sound of "burning tires" and an engine noise "like[] the car was approaching fast."[35] The driver of the BMW rolled down the window and fired three shots.[36] (Crime scene investigators later identified three "possible bullet defects" on the car and found two cartridge cases in the street.[37])

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[32] RR5:81, SE 35, video 2 at 15:46 (8:06:45 AM).

[33] RR4:98; RR5:253, 260; SE 35, video 3 at 23:46 (8:07:28 AM).

[34] RR4:98, 100; RR5:82, 261; SE 35, video 3 at 24:12 (8:07:53 AM).

[35] RR4:99.

[36] RR4:100, 102; RR5:262, 269; SE 35, video 3 at 24:15 (8:07:56 AM).

[37] RR5:111–12, 117, 223–24, 225–26; RR8:97–114 (SE 24–32), 192–99 (SE 77–80), 202–209 (SE 82–85).

The witnesses identify Jones as the shooter.

Taylor heard the gunshots; she thought her tire was shot out, and she looked over and saw the driver's face.[38] It was the man in the white t-shirt.[39] During trial, in open court, Taylor identified the man as Jones.[40]

Brionna, too, got "a good look" at the driver's face and "made eye contact with him."[41] At trial, she testified that when the shots were fired from the BMW, there was only one person in the car and that person fired the gun, and she identified that person in open court as Jones.[42]

Alexandria dies.

The BMW drove off as Taylor pulled into the tire shop parking lot.[43] Brionna remembered that Alexandria looked at her, gasped for air, and "fainted."[44] Taylor saw that Alexandria was "already passed out."[45]

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[38] RR5:256, 262, 269.

[39] RR5:263–64, 293.

[40] RR5:294–95.

[41] RR4:148, 151.

[42] RR4:105, 148–49.

[43] RR5:263, 265, 266; RR6:53–54, 132, 150–51; SE 90, ch. 7 at 16:46.

[44] RR4:102–03.

[45] RR5:262.

Brionna and Janay got out of Taylor's car and back into Brionna's car.[46] Then they all went to the hospital, where Alexandria was pronounced dead.[47] She died from a "gunshot wound to the face."[48]

The investigation focuses on Jones.

Responding officers got surveillance video from both the Burger King and the tire shop.[49] The time stamps on the Burger King videos were accurate, but the times on the tire shop videos were off by about 10 minutes.[50]

Detectives located and identified the BMW in the videos using the Flock Automated License Plate Reader (ALPR) system.[51] This ALPR system uses cameras placed throughout the city that photograph license plates and stores them in a database.[52] Law enforcement officers can search the database by license plate, make and model, color, and body type, and they can limit the search to specific areas and dates.[53]

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[46] RR4:103; RR5:265, 267; RR6:133, 151; SE 90, ch. 3 at 03:53, ch. 4 at 16:57.

[47] RR4:31, 103; RR5:267; RR6:31, 152.

[48] RR4:59.

[49] RR5:33–35; RR6:45–47; SE 35 (Burger King), 90 (tire shop).

[50] RR5:37; RR6:47. Accordingly, the citations to the Burger King videos (SE 35) in this brief reference the time stamps, while the citations to the tire shop videos (SE 90) do not and instead merely reference the elapsed time in the digital file.

[51] RR6:56.

[52] RR6:56, 121, 128.

[53] RR6:56, 121–22.

The detectives searched the database for gray BMWs that were on Bissonnet Street between the Beltway and U.S. Route 59 on September 22 and 23, 2022.[54] Their search located "only one" vehicle that matched this description.[55] That vehicle had a California license plate and was registered to Jones.[56] Detectives got a photo of Jones, compared it to the man in the white t-shirt on the surveillance video, determined it was "consistent with the suspect," and got an arrest warrant for Jones.[57]

Jones is arrested and talks to the detectives.

Jones was eventually arrested in Denver.[58] After being Mirandized and waiving his rights, Jones confirmed that his address was the same as on the vehicle registration, he was in Houston around the time of the shooting, the car photographed by Flock was his, and the man in the white shirt on the Burger King video was him.[59] He denied shooting anyone and said that he didn't even own a gun.[60]

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[54] RR6:59, 122–23.

[55] RR6:59, 123.

[56] RR6:60–63; RR8:215–27 (SE 91–93).

[57] RR6:63–64.

[58] RR6:65, 99.

[59] RR6:66–69, 96.

[60] RR6:97.

Summary of the Argument

Issue One

The jury charge denied Jones his Sixth Amendment right to a jury trial because it did not instruct the jury that they must be unanimous as to whether Jones committed murder under subsection (b)(1) or subsection (b)(2).

The Sixth Amendment right to a jury trial includes the right to a unanimous verdict on the elements. The legislature has the power to define elements as opposed to alternate means of committing elements. Whether something is an element depends on the statutory text, construed using the rules of grammar, subject to the constitutional restraint that anything that increases punishment is an element of a separate legal offense.

Those principles show that subsections (b)(1) and (b)(2) of the murder statute have different elements and are different offenses. Existing precedent holds otherwise, but this Court may reject its own precedent as wrongly decided, and the commonly invoked Court of Criminal Appeals precedent, *Aguirre*, is not on point, was wrongly decided, and is not controlling in light of more recent case law.

Because subsections (b)(1) and (b)(2) define separate offenses with different elements, a jury must be unanimous as to which offense and elements Jones committed. In this case, the jury charge did not require that, so it denied Jones his Sixth Amendment right to

a jury trial. This error is structural because the Supreme Court has said that denial of the jury-trial right is structural. But Jones also suffered "some harm" under the *Almanza* standard in light of the entire charge, the evidence, the jury arguments, and the statements of the court and prosecutor during voir dire.

Issue Two

The evidence is legally insufficient to prove the enhancement sequence. The State alleged two sequential prior final felony convictions, but it proved that both offenses were committed before either conviction became final, which is not the correct sequence. The State's failure to prove the proper enhancement sequence can never be considered harmless, so this Court must reverse and remand for a new punishment hearing.

Issue Three

The judgment incorrectly states that Jones pleaded "true" to the enhancement paragraphs. In fact, the record does not show that Jones was arraigned on the enhancements or entered a plea to them at all. While Rule 44.2(c) requires this Court to presume that Jones was arraigned and entered a plea, this Court cannot presume that the plea was "true" when Jones pleaded not guilty to the indictment and his counsel contested the enhancements during the punishment phase. Accordingly, this Court should reform the judgment to reflect

either that Jones did not plead to the enhancements at all or that he pleaded "not true."

Issue Four

The judgment assesses $85 too much in court costs. Based on the itemization in the bill of costs, the court assessed a $5 witness-summoning fee for each of the 68 subpoenas in the record, totaling $340. But the record also shows that 17 of those subpoenas were not served.

The court cannot assess a cost for a service that was not performed, so it cannot assess a witness-summoning fee for an unserved subpoena. At $5 per subpoena, the court improperly assessed $85 in witness-summoning fees for the 17 unserved subpoenas. This court should therefore reduce the cost assessment by $85 to remove the improperly-assessed costs.

Issue Five

The itemized, issued, and signed bill of costs makes the costs payable now, but the trial court ordered in the judgment that Jones not pay costs until his release from confinement. This Court should modify the bill of costs to remove all of the costs, which are not yet payable.

ARGUMENT

Issue One
(Jury Charge)

1. The jury charge erroneously allowed the jury to return a non-unanimous verdict.

Over defense objection, the court's charge on guilt–innocence instructed the jury on murder under both subsection (b)(1) and subsection (b)(2) without instructing the jury that they must be unanimous as to which subsection Jones was guilty.[61]

This was error because the types of murder under these subsections are different offenses with different elements on which the jury must be unanimous. The court's failure to so instruct the jury denied Jones his right to a unanimous jury verdict under the Sixth Amendment as incorporated against Texas under the Fourteenth Amendment.

This error is structural, so this Court should reverse without a harm analysis. But even if this Court conducts a harm analysis under *Almanza*, it should reverse because Jones suffered some harm from the error.

[61] CR:420–26; RR6:13–16, 160–66.

1.1. Standard of Review for Objected-To Jury-Charge Error

Review of jury-charge error is a two-step process: first, the reviewing court must decide whether error exists; second, it must review any error for harm. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005).

If error in the charge was timely objected to, the judgment must be reversed if "the error appearing from the record was calculated to injure the rights of [the] defendant," which means that reversal is required if there was "some harm" to the accused. Tex. Code Crim. Proc. art. 36.19; *Almanza v. State*, 686 S.W.2d 157, 171–74 (Tex. Crim. App. 1985).

But the United States Supreme Court has held that some jury-charge errors can "defy analysis by 'harmless-error' standards." *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993). These "structural errors" are "structural defects in the constitution of the trial mechanism," "without which a criminal trial cannot reliability serve its function." *Id.*

Because the right to trial by jury "reflects … a profound judgment about the way in which law should be enforced and justice administered," "the deprivation of that right … unquestionably qualifies as 'structural error.'" *Id.*

1.2. The Sixth Amendment right to a jury trial, as incorporated to the states under the Fourteenth Amendment, includes a right to a unanimous jury verdict on every element.

In 1995, the United States Supreme Court held that the Sixth Amendment jury-trial right requires that a criminal conviction "rest upon a jury determination that the defendant is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 505, 510 (1995) (emphasis added). And in 2020, the Court held that the Sixth Amendment jury-trial right also includes a requirement that, in criminal jury trials for serious offenses, the verdict should be unanimous. *Ramos v. Louisiana*, 590 U.S. 83, 91–92 (2020). The Court further held that this right is incorporated against the states by the Fourteenth Amendment. *Id.* at 93.

Therefore, the Sixth Amendment right to a jury trial, as incorporated to the states under the Fourteenth Amendment, requires a criminal conviction for a serious offense to rest upon a unanimous jury determination that the defendant is guilty of every element of the crime with which he is charged.[62] *Ramos*, 590 U.S. at 88, 90–91, 93; *Gaudin*, 515 U.S. at 509–10; U.S. Const. amends. VI, XIV.

[62] The Texas Constitution also gives defendants a right to a unanimous jury in felony cases. *Ngo*, 175 S.W.3d at 745 (citing Tex. Const. art. V, § 13). Counsel is unaware of any authority, post-*Ramos*, that the Texas Constitutional right is broader than the Sixth Amendment right.

1.2.1. The jury must be unanimous with respect to elements, but not necessarily with respect to the means used to commit an element.

Elements of crimes are those things that must be stated in the indictment and proved to a jury beyond a reasonable doubt. *United States v. O'Brien*, 560 U.S. 218, 224 (2010); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998).

While a jury must be unanimous with respect to each element, the "jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."[63] *Richardson*, 526 U.S. at 817 (citing *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (plurality op.); *Andersen v. United States*, 170 U.S. 481, 499–501 (1898)).

Whether something is an element is left up to the legislature. *O'Brien*, 560 U.S. at 225. Whether the legislature has made something an element or a means of committing an element is question of statutory interpretation, subject to constitutional restraints. *Richardson*, 526 U.S. at 818–20; *O'Brien*, 560 U.S. at 225.

[63] The Court gave as an "example" of what would constitute alternate means the following: "Where … an element of robbery is force or the threat of force, some jurors might conclude that the defendant *used a knife* to create the threat; others might conclude he *used a gun*." *Richardson*, 526 U.S. at 817 (emphasis added).

1.2.2. In Texas, elements are prescribed by statute, and the "eighth-grade grammar test" is used to identify essential elements of an offense as opposed to alternate means of commission.

In Texas, the Legislature has specified that the "elements of [an] offense" are: 1) the forbidden conduct; 2) the required culpability; 3) any required result; and 4) the negation of any exception to the offense. Tex. Penal Code § 1.07(a)(22). "Conduct" means "an act or omission and its culpable mental state." *Id.*, § 1.07(a)(10). "Culpability" also means the culpable mental state. *Celis v. State*, 416 S.W.3d 419, 430 (Tex. Crim. App. 2013) (construing the phrase "kind of culpability" in the mistake-of-fact statute, Tex. Penal Code § 8.02(a), to mean "culpable mental state").

Recognizing that jury unanimity is required on the elements of the offense but is generally not required on the alternate modes or means of commission, the Court of Criminal Appeals has developed a test "to identify the essential elements or gravamen of an offense and the alternate modes of commission, if any." *Pizzo v. State*, 235 S.W.3d 711, 714 (Tex. Crim. App. 2007).

"This is accomplished," the Court held, "by diagramming the statutory text according to the rules of grammar." *Id.* Under this "eighth-grade grammar" test:

> The essential elements of an offense are, at a minimum: 1) the subject (the defendant); 2) the main verb; 3) the

> direct object if the main verb requires a direct object (i.e., the offense is a result-oriented crime); the specific occasion; and the requisite mental state.

Id. at 714–15 (cleaned up but retaining quirky numbering scheme) (quoting *Stuhler v. State*, 218 S.W.3d 706, 718 (Tex. Crim. App. 2007); *Jefferson v. State*, 189 S.W.3d 305, 315–16 (Tex. Crim. App. 2006) (Cochran, J., concurring)). Conversely, under this same test:

> The means of commission or nonessential unanimity elements are generally set out in "adverbial phrases" that describe how the offense was committed. Such phrases are commonly preceded by the preposition "by."

Id. at 715 (cleaned up) (quoting *Stuhler*, 218 S.W.3d at 718; *Jefferson*, 189 S.W.3d at 316 (Cochran, J., concurring)).

1.2.3. Constitutionally, any fact that increases the prescribed range of penalties is an element that must be unanimously found by a jury.

The constitutional restraint on the legislature's power to define elements is that any fact, other than a prior conviction, "that increase[s] the prescribed range of penalties to which a criminal defendant is exposed" is an element of a "separate legal offense." *Alleyne v. United States*, 570 U.S. 99, 111 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 n. 10, 490 (2000)). Accordingly, the Sixth Amendment gives a defendant the right to have a jury

unanimously find such facts beyond a reasonable doubt. *Ramos*, 590 U.S. at 91–92; *Alleyne*, 570 U.S. 111–12.

The Supreme Court had briefly toyed with the idea of limiting *Apprendi* to say that only those facts that increased the "statutory maximum" were elements. *Harris v. United States*, 536 U.S. 545, 557 (2002). But after only five years, the Court overruled *Harris*, because "there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum." *Alleyne*, 570 U.S. at 116 (overruling *Harris*).

Alleyne's rejection of *Harris* allows an additional extrapolation from the rule: any fact that *converts noncriminal conduct into a crime* is also an element. If a fact that increases the maximum punishment is an element, and if a fact that increases the minimum punishment is an element, then any fact that creates an offense in the first place—which increases both the minimum *and* maximum punishment from *nothing* to *something* (either a fixed amount or a range)—must also be an element.

The Supreme Court has not specifically addressed that extrapolation in a majority opinion. But in *Apprendi*, Justice Thomas wrote a concurring opinion in which he reviewed the case law underpinning the Court's elements analysis and concluded that "[t]his authority establishes that "a 'crime' includes every fact that is

by law a basis for *imposing* or increasing punishment." *Apprendi*, 530 U.S. at 499–501 (Thomas, J., concurring) (emphasis added).[64]

1.3. Subsections 19.02(b)(1) and (b)(2) contain different elements on which the jury must be unanimous.

Applied to the murder statute, these principles demonstrate that murder under subsection (b)(1) and subsection (b)(2) have different essential elements that the jury must unanimously find beyond a reasonable doubt. The statute provides that:

> (b) A person commits an offense if the person:
>
> 1) intentionally or knowingly causes the death of an individual; [or]
> 2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual[.]

Tex. Penal Code § 19.02(b)(1)–(2).

1.3.1. The subsections contain different elements according to the "eighth-grade grammar" test.

The "eighth-grade grammar" test demonstrates that subsections (b)(1) and (b)(2) contain different essential elements. *See Pizzo*, 235 S.W.3d at 714–15.

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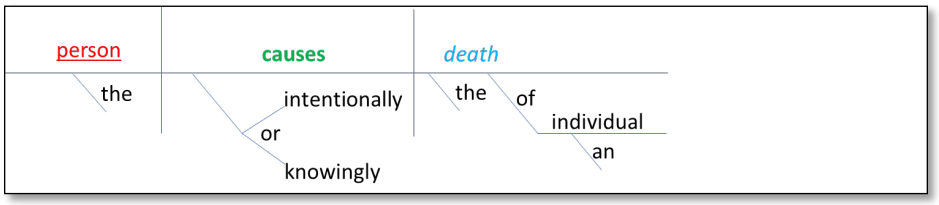
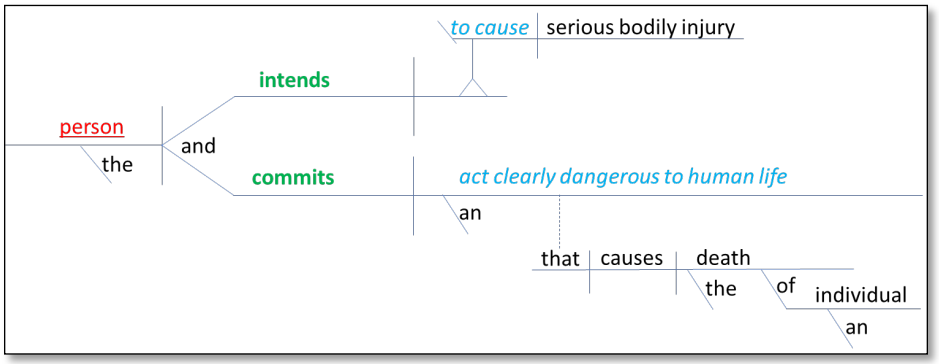
[64] Justice Thomas's concurrence should be given serious attention given that seven years later, he wrote the majority opinion in *Alleyne*, which overruled *Harris* and said that *Apprendi* really is as broad as it seems. *Alleyne*, 570 U.S. at 116.

Each subsection can be diagrammed as follows, with the subject, **verb**, and *direct object* emphasized for comparison purposes:

(b)(1):



(b)(2):



The only thing subsections (b)(1) and (b)(2) have in common, grammatically, is the subject: "the person."[65] Every other part is different. The verb/direct-object combinations are different: in (b)(1), it is "**causes** the *death*," while in (b)(2), it is both "**intends** *to cause* serious bodily injury" and "**commits** an *act clearly dangerous to human life*." The culpable mental states are also different: in (b)(1), the mental states "intentionally or knowingly" are adverbs that

[65] They also share a common occasion: the death "of an individual," which is a common unit of prosecution for *double-jeopardy* purposes. *See, e.g.*, *Stanley v. State*, 470 S.W.3d 664, 669–70 (Tex. App.—Dallas 2015, no pet.); *Jimenez v. State*, 67 S.W.3d 493, 510–11 (Tex. App.—Corpus Christi–Edinburg 2002, pet. ref'd). But that unit plays a different grammatical role in each subsection. In (b)(1), it's the direct object, while in (b)(2), it's part of a restrictive adjective clause.

modify the verb "causes", while in (b)(2), the mental state "**intends** *to cause* serious bodily injury" is itself a verb with a direct object.

Moreover, *no* part of section 19.02 contains any "adverbial phrases"—beginning with "by" or otherwise—that merely describe *how* the offense was committed. *Cf. Pizzo*, 235 S.W.3d at 715. There are therefore no alternative "manners" or "means" in the statute; there are only elements.[66]

"At a minimum," these are the essential elements each offense that a jury must unanimously find beyond a reasonable doubt:

1) **Under subsection (b)(1)**, a person commits an offense if "the person" (the subject/actor) "intentionally or knowingly" (adverb/mental state) "**causes**" (the main verb/conduct) "the *death*" (the direct object/result) "of an individual" (prepositional phrase/specific occasion).

2) **Under subsection (b)(2)**, a person commits an offense if "the person" (the subject/actor) "**intends**" (first main verb/mental state) "*to cause* serious bodily injury" (infinitive-phrase direct object of mental state) and "**commits**" (second main verb/conduct) "*an act clearly dangerous to human life*" (the direct object) "that causes the death of an individual" (restrictive adjective clause/specific occasion/result).

These elements are not the same. Therefore, they are different.

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[66] Contrast this with *Jefferson*, in which legislature had set out in the statute alternate means of committing injury to a child—"*by* act or omission"—which allowed the Court of Criminal Appeals to determine that these alternate means were "basically morally and conceptually equivalent." 189 S.W.3d at 313.

1.3.2. The subsections contain different elements according to the constitutional test, too.

The constitutional constraint also reveals similar divergence among elements, particularly with the mental states.

In subsection (b)(1), the mental state "intentionally or knowingly" is a fact that increases the statutory punishment for the defendant's conduct. That a person "causes the death of an individual," without the mental state, is not murder punishable by 5–99 years or life. If the person acts recklessly, the offense is manslaughter, punishable by 2–20 years. Tex. Penal Code §§ 12.33, 19.04. If he acts with criminal negligence, the offense is criminally negligent homicide, punishable by 180 days to 2 years in state jail or by 2–10 years in prison if the jury makes a deadly-weapon finding. Tex. Penal Code §§ 12.34, 12.35, 19.05. If he acts with no culpable mental state, there's no offense and it's not punishable by anything.

The mental state in subsection (b)(2), "intends to cause serious bodily injury," is also a fact that increases the statutory punishment. That a person "commits an act clearly dangerous to human life that causes the death of an individual," without a mental state, is not murder—it's not any offense at all.

In each subsection, the mental state increases the available punishment; therefore, under *Alleyne* and *Apprendi*, it is an element that a jury must unanimously find beyond a reasonable doubt.[67]

Think about it this way: If these mental states were merely interchangeable alternates, the State could pick and choose from among them. It could allege that a defendant "knowingly committed an act clearly dangerous to human life that caused the death of an individual." Or that a defendant "intended to cause serious bodily injury and caused the death of an individual." Neither is murder.[68]

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[67] This is not a new concept. Even under Texas's old two-degree murder scheme, which existed between 1858 and 1913, the Court of Appeals (the predecessor of the modern Court of Criminal Appeals) reminded bench and bar that "it should be remembered that every killing is not murder, nor is every unlawful killing murder. Murder, as an offense, is distinctly defined and has a distinctive meaning attached to it by our law, and no killing is murder unless it contains the elements and ingredients of that offense as defined by the law." *Hodges v. State*, 3 Tex. Ct. App. 470, 472 (1878). The Court made clear that these "elements and ingredients" include the mental state: "Now, malice is the essential ingredient and requisite element to murder of all kinds, and without this element and ingredient no homicide can be murder under our law." *Id.*

[68] The latter example *could* be murder under a theory of transferred intent, but 1) it wouldn't be charged that way in the indictment, 2) the jury would be instructed on transferred intent, and 3) the defendant would be entitled to an instruction on mistake of fact. *Thompson v. State*, 236 S.W.3d 787, 799–800 (Tex. Crim. App. 2007).

1.4. Existing precedent holds that subsections (b)(1) and (b)(2) merely define alternate manners and means of committing a single offense.

The text of the statute, the "eighth-grade grammar" test, and the Constitution all demonstrate that subsection (b)(1) and subsection (b)(2) are different offenses with different essential elements. But there is one basis for concluding that they merely define alternate manners and means: existing precedent.

In *Smith v. State*, 436 S.W.3d 353, 378 (Tex. App.—Houston [14th Dist.], 2014, pet. ref'd), this Court held, in response to a unanimity challenge, that "the three methods of committing murder set forth in the statute are different manners and means of committing the same offense, not distinct and separate offenses."[69]

Because "the only offense involved in this case was murder by any of the three methods set forth in the Penal Code," this Court concluded that the "jury was not required to agree unanimously as to the manner and means by which" Smith committed murder. *Id.*

For that holding, this Court relied substantively on two cases: *Gandy v. State*, 222 S.W.3d 525 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); and *Aguirre v. State*, 732 S.W.2d 320 (Tex. Crim. App. 1982) (op. on reh'g). *Id.*

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[69] Smith had been charged under all three subsections of 19.02(b) as they then existed, including two allegations of felony murder based on different felonies. *Smith*, 436 S.W.3d at 377–78.

1.4.1. But this Court's existing precedent is wrong.

Adherence to settled precedent is important, but *stare decisis* is not an inexorable command. *Ex parte Thomas*, 623 S.W.3d 370, 381 (Tex. Crim. App. 2021) (citing *Paulson v. State*, 28 S.W.3d 570, 571–72 (Tex. Crim. App. 2000)). A court may reconsider its own precedent if the original rule or decision was flawed from the outset. *Id.* (citing *Ex parte Lewis*, 219 S.W.3d 335, 338 (Tex. Crim. App. 2007)). A court is not constrained to follow precedent that is wrongly decided. *Id.* (citing *Paulson*, 28 S.W.3d at 571). Accordingly, if *Smith* and *Gandy* were wrongly decided—"flawed from the outset"—this Court doesn't have to follow them.

Gandy, upon which *Smith* relied, decided that the murder statute sets out alternate manners and means using the following reasoning:

> It is common form for the legislature to define an offense with the preparatory phrase "a person commits an offense if…." Thereafter, criminal statutes typically set forth various manner and means of committing the offense.

Gandy, 222 S.W.3d at 529. Because subsections (b)(1)–(3) of the murder statute followed such a phrase, this Court concluded that they were manners and means. *Id.*

But that reasoning was wrong, and this Court provided no authority to support it. In fact, the Court of Criminal Appeals has said the exact opposite, observing that the phrase, "A person commits an

offense if" is "the most 'obvious and common method of prescribing *elements* of an offense'." *State v. Green*, 682 S.W.3d 253, 270–71 (Tex. Crim. App. 2024) (emphasis added) (quoting *Oliva v. State*, 548 S.W.3d 518, 523 (Tex. Crim. App. 2018)).[70]

Thus, because the murder statute begins with the phrase, "A person commits an offense if …," it—by its own terms—sets out elements, not alternate manners and means. *Green*, 682 S.W.3d at 270–71.[71] *Gandy* was wrong to hold otherwise, and therefore so was *Smith*.

But, as this Court observed in *Smith*, *Gandy* ultimately relied on *Aguirre*, which, it noted, held that murder under subsection (b)(1) and murder under subsection (b)(3) "were merely two different manner and means of committing the same offense." *Gandy*, 222 S.W.3d at 529 (citing *Aguirre*, 732 S.W.2d at 325–26). Because *Aguirre* was decided by the Court of Criminal Appeals, we must look at it in even more depth.

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[70] Neither *Green* nor *Oliva* invented this concept; the Court had made the same observation 30 years earlier in *Wilson v. State*, 772 S.W.2d 118, 121 (Tex. Crim. App. 1989).

[71] In multiple sections of the penal code, the Court has concluded that the phrase "A person commits an offense if" precedes not just elements but *separate offenses*. *See, e.g.*, Tex. Penal Code §§ 21.11(a) (so construed in *Loving v. State*, 401 S.W.3d 642, 648 (Tex. Crim. App. 2013)), 22.021(a)(1) (so construed in *Gonzales v. State*, 304 S.W.3d 838, 849 (Tex. Crim. App. 2022)), 22.04(a) (so construed in *Nawaz v. State*, 663 S.W.3d 739, 748 (Tex. Crim. App. 2022)), 32.31(b) (so construed in *Ngo*, 175 S.W.3d at 748), 39.03(a)(1) (so construed in *Haight v. State*, 137 S.W.3d 48, 50-51 (Tex. Crim. App. 2004)).

1.4.2. The case on which all existing precedent rests, *Aguirre*, isn't on point, was wrongly decided, and conflicts with more recent case law from the Court of Criminal Appeals and the United States Supreme Court.

This Court relied on *Aguirre* in *Smith* and *Gandy*. So have other courts of appeals in their own cases.[72] It's ~~turtles~~ *Aguirre* all the way down.

Unlike its own precedent, this Court *is* bound by controlling precedent from the Court of Criminal Appeals. *See Flores v. State*, 513 S.W.3d 146 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). But that doesn't bind this Court to *Aguirre*, for two reasons. First, *Aguirre* isn't on point. Second, *Aguirre* was not just wrongly decided; it also conflicts with more recent case law from the Court of Criminal Appeals and the Supreme Court.

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[72] For published opinions, *see*, *e.g.*, *Lopez v. State*, 672 S.W.3d 915, 926 (Tex. App.—Corpus Christi–Edinburg 2023, pet. ref'd); *Gilbert v. State*, 575 S.W.3d 848, 868 (Tex. App.—Texarkana 2019, pet. ref'd) (citing *Aguirre* and also *Barfield v. State*, 202 S.W.3d 912, 915 (Tex. App.—Texarkana pet. ref'd) (itself citing *Aguirre*)); *Bundy v. State*, 280 S.W.3d 425, 432 (Tex. App.—Fort Worth 2009, pet. ref'd) (citing *Aguirre* and also *Davis v. State*, 268 S.W.3d 683, 710–12 (Tex. App.—Fort Worth 2008, pet. ref'd) (itself citing *Aguirre*)); *London v. State*, 325 S.W.3d 197, 206–07 (Tex. App.—Dallas 2008, pet. ref'd) (citing *Yost v. State*, 222 S.W.3d 865, 877–78 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (itself citing *Aguirre*)); *Garcia v. State*, 246 S.W.3d 121, 141 (Tex. App.—San Antonio 2007, pet. ref'd). This list is not exhaustive, and there are countless unpublished cases from the intermediate courts that do the same.

1.4.2.1. *Aguirre* isn't on point.

Aguirre isn't even on point. *Aguirre* didn't address jury unanimity; it addressed two other issues: merger and general verdicts. *Aguirre*, 732 S.W.2d at 324–26 (op. on reh'g).

Aguirre first addressed **merger**. Aguirre had been charged with murder under then-subsections (a)(1) and (a)(3), which correspond to today's subsections (b)(1) and (b)(3)—murder by intentionally or knowingly causing death, and felony murder. *Aguirre*, 732 S.W.2d at 321–22 (panel op.). The jury, having been charged on both theories, returned a general guilty verdict. *Id.* at 322 (panel op.). A divided panel of the Court initially held that this was error because the felony-murder charge was improper under the merger doctrine. *Id.* at 322–23 (panel op.).

On the State's motion for rehearing, the en banc Court affirmed the conviction. *Id.* at 323–27 (op. on reh'g). Relying on another case that issued after the panel opinion, the en banc Court concluded that the merger doctrine did not prevent a conviction for felony murder in Aguirre's case. *Id.* at 324–25 (op. on reh'g) (citing *Murphy v. State*, 665 S.W.2d 116 (Tex. Crim. App. 1983)).

Next, the Court decided whether "the submission of a general verdict form constitutes reversible error." *Aguirre*, 732 S.W.2d at 325 (op. on reh'g). This mattered to the panel because a **general verdict** made it impossible to tell whether the jury relied on an invalid

theory—felony murder—to convict. *Id.* at 322–23 (panel op.). Because the en banc Court held that felony murder was, in fact, a valid theory, it had to separately determine whether a general verdict was proper. *Id.* at 325–26 (op. on reh'g).[73]

And that's why *Aguiree* has nothing to do with **unanimity**. The Court observed that the code of criminal procedure allows each separate count in an indictment to contain as many separate paragraphs charging the same offense as necessary. *Id*. at 325 (citing Tex. Code Crim. Proc. art. 21.24(b)). The Court announced, with no analysis, that the indictment was a "one count indictment" that had charged intentional–knowing murder and felony murder as "two paragraphs charging two different theories as to the victim's murder." *Id.*

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[73] The propriety of a general verdict is different from ensuring a defendant's right to a unanimous jury. Each can be accomplished without sacrificing the other. In a trial for murder charged under subsections (b)(1) and (b)(2), the court could instruct the jury:

> Now, if you *unanimously* find beyond a reasonable doubt that the defendant [committed (b)(1) murder]; or
>
> If you *unanimously* find beyond a reasonable doubt that the defendant [committed (b)(2) murder],
>
> Then you shall find the defendant guilty of murder, as charged in the indictment.

Such an instruction would both ensure unanimity and allow a general verdict. This is exactly the kind of instruction that Jones requested, and the court denied, during the charge conference. RR6:15.

The Court invoked a *1937* opinion, *McArthur v. State*, in which the Court had said:

> … if but one transaction is involved, and the offense be one which may have been committed in any one of several ways, the pleader may charge in the indictment in one count that such offense had been committed by doing this, and that, and the other, and there will be no duplicity, and need be but a verdict of guilty; or the pleader may set out in separate counts each one of the various ways in which it is claimed the offense might have been committed, in which event also there need be but a verdict of guilty.

Id. at 326 (quoting *McArthur v. State*, 105 S.W.2d 227, 230 (1937) (op. on reh'g)). But *McArthur* dealt with a wholly different statute, and *Aguirre* was wrong to rely upon it.

1.4.2.2. *Aguirre* was wrongly decided because it relied on *McArthur*, which is inapplicable to the modern penal code definition of murder.

The Court was wrong to rely on *McArthur* because *McArthur*, being from 1937, is wholly inapplicable to murder cases under the modern penal code.

Murder was defined differently in 1937. Back then, it was the voluntary killing of another person:

> Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the

> absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing.

Act of March 24, 1927, 40th Leg., R.S., ch. 274, § 1, 1927 Tex. Gen. Laws 412, 412–13 (amending 1925 Penal Code art. 1256), *repealed by* Act of May 23, 1973, 63rd Leg., R.S., ch. 399, § 3, 1973 Tex. Gen. Laws 883, 994.

The prior 1925 definition of murder wasn't much different; it was killing a person with malice aforethought:

> Whoever with malice aforethought shall kill any person within this State shall be guilty of murder. Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide.

Act of 1925, 39th Leg., R.S., SB 7, article 1256 (creating 1925 Penal Code art. 1256) (amended 1927).

Same with the 1913 definition:

> Every person with sound memory and discretion who, with malice aforethought shall unlawfully kill any person with this State shall be guilty of murder. Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide, or manslaughter, or which excuse or justify the homicide.

Act of March 31, 1913, 33rd Leg., R.S., ch. 116, § 1, art. 1140, 1913 Tex. Gen. Laws 238, 238 (repealing and replacing 1911 Penal Code arts. 1140–42 with new art. 1140) (itself replaced by 1925 Penal Code art. 1256).[74]

Thus, any case decided between 1913 and 1973 (when the modern Penal Code was enacted) dealt with a single definition of murder: Murder was the killing of any person, committed either "voluntarily" or "with malice aforethought," depending on the year.

It was under this single-offense statutory scheme that the Court decided *McArthur*. There, the indictment contained three counts of murder that specified different *manners* or *means* of "kill[ing] Ben Speegle": 1) "by choking him with his hands"; 2) "by striking, pounding, and stamping him with his feet"; and 3) "in some way and manner and by some means, instruments, and weapons to the grand

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[74] Between 1858 and 1913, Texas divided murder into two degrees. 1911 Penal Code arts. 1140–42; 1895 Penal Code arts. 710–12; 1879 Penal Code arts. 605–607. First degree murder was murder committed by certain specified means, or murder committed in certain, specified circumstances. *Id.* art. 1141 (1911), 711 (1895), 606 (1879). All other murder was second degree murder. *Id.*

A jury that convicted a defendant of murder had to find in their verdict whether the murder was first or second degree. *Id.* art. 1142 (1911), 712 (1895), 607 (1879). The two-degree scheme was first enacted in 1858. Act of Feb. 12, 1858, 7th Leg., R.S., ch. 121, arts. 607–09, 1858 Tex. Gen. Laws 156, 173–74 (amending 1856 Penal Code arts. 607–09).[74]

This replaced the original 1856 Penal Code, which had established a single offense of murder, for which the jury had broad punishment discretion. 1856 Penal Code art. 607–09.

jury unknown." *McArthur*, 105 S.W.2d at 227–28.[75] Only the first two counts were submitted to the jury, which convicted McArthur of murder under both counts. *Id.*

[75] *McArthur* wasn't a one-off. Other cases prosecuted under the old codes similarly used multiple counts of murder that specified different means of commission. *See*, *e.g.*:

- *Hintz v. State*, 396 S.W.2d 411, 413 (Tex. Crim. App. 1965) (counts submitted to the jury alleged the defendant killed the deceased 1) "by choking and strangling her with his hand," and 2) "with a water bottle or with a glass container or a glass jug or in some way or manner and by some means, instruments and weapons the exact nature of which is unknown to the Grand Jury");
- *Cavazos v. State*, 365 S.W.2d 178, 180 (Tex. Crim. App. 1963) (counts alleged that the defendant killed the deceased 1) "by choking her with his hands," and 2) "by strangling her, the manner and means of effecting said strangulation being to the grand jurors unknown");
- *Johnson v. State*, 336 S.W.3d 175, 178 (Tex. Crim. App. 1960) (counts alleged that defendant killed the deceased "by: (1) strangling him with his hands, or (2) suffocating him by squeezing his chest with his arms and hands, or (3) suffocating him by placing him inside a refrigerator and closing the door thereby sealing him inside of said refrigerator, or (4) some way or manner by instruments and weapons to the grand jury unknown, through a mistake or accident while intending to commit the offense of sodomy, or (5) while in the act of preparing for or executing the offense of sodomy");
- *Martinez v. State*, 333 S.W.3d 370, 372 (Tex. Crim. App. 1960) (counts alleged that defendant caused death 1) "by striking with the hands, kneeing with the knee, and by pushing against with the knee," and 2) "by jabbing a piece of wood through the vaginal canal and rectum into the abdomen"); and
- *Stanley v. State*, 48 S.W.2d 279, 280 (Tex. Crim. App. 1932) (counts alleged that defendant killed deceased 1) "by hitting, striking, and beating him with a gun," 2) "by hitting, striking, and beating him with a bottle," and 3) "in some way or manner and by some means, instruments, and weapons to the grand jury unknown").

On both original submission and rehearing, McArthur argued that the verdict was "fatally defective" because the jury had convicted him under both counts "without allocating their verdict to either count." *Id.* at 229, 230. And on both original submission and rehearing, the Court rejected his argument, saying that McArthur "was not charged with separate and distinct offenses in each count," but instead, the "means of committing the one offense, to wit, murder, were charged in different counts." *Id.* When "the offense be one which may have been committed in any one of several ways," the Court held, the "various ways" can be set out in either one count or separate counts, and only one verdict of guilty is required. *Id.*

The "various ways" that McArthur committed murder were "by choking him with his hands," and "by striking, pounding, and stamping him with his feet." The *elements* of murder, however, were the same in every count: McArthur voluntarily killed Ben Speegle. *See* 1925 Penal Code art. 1256 (amended 1927). The "various ways" in which he did so were not statutory elements. The statute didn't mention them at all. Accordingly, they all *could* have been included in one count because they all described *how* McArthur voluntary killed Ben Speegle. *McArthur*, 105 S.W.2d at 229–30.

The *Aguirre* Court was therefore wrong to rely on *McArthur* when it held that the different *elements* in section 19.02 are merely "ways" of committing murder. The modern-code statutory provisions,

"intentionally or knowingly caus[ing] the death of an individual," and "intend[ing] to cause serious bodily injury and commit[ting] an act clearly dangerous to human life that causes the death of an individual" are both like "voluntarily kill[ing] any person" and unlike "choking," "striking," "pounding," and "stamping." In other words, they are *elements*, not *ways* of committing the elements. *McArthur* provides no support for *Aguirre's* assumption that the different subsections of the murder statute are merely "different ways of committing the same offense." *Aguirre*, 732 S.W.2d at 326.

1.4.2.3. *Aguirre* was also wrongly decided because it relied on three other inapplicable and unsupported cases.

The other cases that the *Aguirre* Court cited are no better than *McArthur*.

To further support its statement that the indictment "did not allege different offenses but only alleged different ways of committing the same offense," the Court cited three cases: *Riley v. State*, 658 S.W.2d 818 (Tex. App.—Fort Worth 1983, no pet.);[76] *Bailey v. State*, 532 S.W.2d 316 (Tex. Crim. App. 1975); and *Floyd v. State*, 296 S.W.2d 523 (Tex. Crim. App. 1956). *Aguirre*, 732 S.W.2d at 326. None of these cases hold up upon scrutiny.

[76] *Aguirre* is dated "1982," but the Court's opinion on rehearing issued in 1987. This explains how it relies on a Fort Worth case from 1983.

Riley was an intermediate court of appeals opinion that held that then-subsections (a)(1) and (a)(2) are "but two methods of committing" "one offense." 658 S.W.3d at 819. Riley's murder indictment had alleged those subsections as separate counts. *Id.* at 818–19. Riley argued that the court should not have given the jury a "general verdict" form because he was charged with two counts of murder. *Id.* at 819.

The Fort Worth Court of Appeals, without citing any precedent, announced that the two "counts" were really two "paragraphs" in "one count" that charged "two methods of committing" murder. *Id.* The court didn't explain its holding. It didn't analyze the statute to determine what the elements were. It didn't even cite to *McArthur* and other old-code cases. It simply declared that the two subsections are merely "methods" rather than offenses.[77]

Bailey, meanwhile, dealt with a six-count indictment that alleged different manners and means of committing murder. 532 S.W.2d at 322. The Court did not say what all six alleged manners and means were, but it listed three of them: "that [Bailey] caused 'deceased to choke and strangle on blood and food particles and bodily fluids' by beating her with a pipe (counts three and four)" and "that [Bailey]

[77] Perhaps the Fort Worth Court was influenced by the original 1982 opinion in *Aguirre*. If so, then *Aguirre's* reliance on *Riley* turns this entire line of case law into one big mess of self-referential circular reasoning.

caused her death by beating deceased with his fist (count five)." *Id*. These "brute fact" allegations are not any kind of element found in any subsection of section 19.02. Moreover, *Bailey* does not even specify under which subsection Bailey was charged.[78] *Id.*

And *Floyd* wasn't even a murder case. Floyd had been charged with misapplication of county or city funds under article 95 of the 1925 Penal Code. *Floyd*, 296 S.W.2d at 525. That statute provided:

> If any officer of any county, city[,] or town, or any person employed by such officer, shall fraudulently take, misapply, or convert to his own use any money, property[,] or other thing of value belonging to such county, city[,] or town, that may have come into his custody or possession by virtue of his office or employment, or shall secret the same with intent to take, misapply[,] or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be confined in the penitentiary not less than two nor more than ten years.

1925 Penal Code art. 95.

The indictment charged, in "alternate counts," "the taking, misapplication, and conversion of a 'house' and 'lumber.'" *Floyd*, 296 S.W.2d at 527. The opinion makes clear that the "alternate" counts

[78] The offense in *Bailey* was committed in February 1974, one month after the modern penal code became effective. *Bailey*, 532 S.W.2d at 318; *see* Act of May 23, 1973, 63rd Leg., R.S., ch. 399, § 4, 1973 Tex. Gen. Laws 883, 995 (effective January 1, 1974).

were different ways of proving the same property at issue—a "house" versus "lumber." *Id.* at 528 ("The motion to elect alleged that two felonies were charged, the subject of one being a 'house' and the subject of the other being 'lumber.'").

The Court then observed that the "lumber" at issue was the lumber "of which said house was constructed." *Id.* On that basis—that the house and lumber were both the same "property"—the Court concluded that the "same act or transaction" was "charged in different counts which are phrased differently in order to meet possible variations in proof," and so the State was not required to elect among the two counts. *Id.*

Just as with pre-1974 murder case law, the allegations at issue were not statutory elements. The words "house" and "lumber" did not appear in article 95. Instead, the statutory element was "property," and the various ways of proving that element were to show that it was either a house or lumber.[79]

Simply put, none of these cases support *Aguirre*'s holding that the different subsections in section 19.02 are different "ways" or

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[79] Floyd had also argued that each count alleged three offenses by alleging three actions—"take, misapply[,] and convert"—and the counts were therefore "duplicitous." *Id*. at 527. The Court rejected this argument based on *Beard v. State*, 143 S.W.2d 967, 968 (Tex. Crim. App. 1940), in which the Court had held, based on Willson's Criminal Forms, that an indictment for this offense was sufficient if it charged all three actions. *Floyd*, 296 S.W.2d at 527–28 (citing *Beard*, 143 S.W.2d at 968 (citing Willson's *Texas Criminal Forms*, 4th Ed., p. 13, Form 25)).

"manners" of committing one offense. *Aguirre*, 732 S.W.2d at 321, 324, 326.

1.4.2.4. *Aguirre* need not control, anyway, because it conflicts with *Pizzo* and *Alleyne*, which are more recent and provide the correct analysis.

This Court cannot ignore *Aguirre* simply because it is wrong, but this Court can recognize that more recent case law has superseded it.

Aguirre was first decided 42 years ago. Since then, the Court of Criminal Appeals has explained how to properly determine what the legislature intended to be an element as opposed to an alternate manner and means. *Pizzo*, 235 S.W.3d at 714–15; *see also Green*, 682 S.W.3d at 270–71. And the Supreme Court has explained the constitutional limitations on declaring facts to be "manners and means" instead of elements. *Alleyne*, 570 U.S. at 111–16. In light of this more recent case law, whatever value *Aguirre* has as precedent, it has no value as *controlling* precedent on this issue.[80]

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[80] In an unpublished opinion, the First Court of Appeals recently opined that it was "not persuaded that *Aguirre* is of 'little precedential value.'" *Lazarine v. State*, No. 01-19-00982-CR, 2021 WL 5702182, at *7 (Tex. App.—Houston [1st Dist.] Dec. 2, 2021, pet. ref'd) (mem. op., not designated for publication). The court so opined because it did not believe that the "eighth-grade grammar" test should supersede *Aguirre*. *Id.* at *7–8. But it did so on the grounds that other courts had relied on *Aguirre* and that the "eighth-grade grammar test" does not always work to identify legislative intent. *Id.* Both of those reasons are backwards: if *Aguirre* is unsound—a matter that the court did not actually analyze—then it should not control over more recent case law, even if other courts have relied upon it. It is that part of the analysis—honestly evaluating the conceptual soundness of *Aguirre*—that Jones is asking this Court to do here.

1.5. Because subsection (b)(1) and subsection (b)(2) define different offenses, the jury charge in this case denied Jones his right to a unanimous jury.

After all that,[81] turning to the jury charge in this case, the court's error is apparent.

Over defense objection, the court instructed the jury on murder under subsections (b)(1) and (b)(2) without requiring the jury to be unanimous with respect to the separate elements in either subsection.[82] While the court later told the jury that its "verdict must be by a unanimous vote" of the jury, the court did not instruct the jury that they must unanimously decide whether Jones committed the elements of murder under subsection (b)(1) or under subsection (b)(2).[83]

This denied Jones his Sixth Amendment right to have the jury unanimously determine whether he was guilty of every element of the crimes with which he was charged. *See Ramos*, 590 U.S. at 88, 90–91, 93; *Gaudin*, 515 U.S. at 509–10.

[81] It's a lot.

[82] CR:421; RR6:13–16.

[83] CR:420–26.

1.6. The error is reversible.

1.6.1. In light of *Ramos*, a jury-unanimity violation is structural error.

Deprivation of the right to trial by jury is structural error. *Sullivan*, 508 U.S. at 281–82. The right to trial by jury includes the right to a unanimous verdict. *Ramos*, 590 U.S. at 88, 90–91, 93.

Thus, by denying Jones the right to a unanimous verdict, the court's charge in this case denied him the right to trial by jury. Such an error is structural, and this Court must reverse the conviction. *Sullivan*, 508 U.S. at 281–82.

1.6.2. Regardless, Jones suffered some harm from the jury-charge error in this case.

Even if this Court disagrees with *Sullivan* and concludes that *this kind* of deprivation of the right to trial by jury is not structural error, this Court should reverse because Jones suffered some harm from the error.

"Some harm" means "the presence of any harm, regardless of degree." *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). Whether harm exists is based on four factors: 1) the entire jury charge, 2) the state of the evidence, 3) the jury arguments, and 4) any other relevant information as revealed by the record as a whole. *French v. State*, 563 S.W.3d 228, 235–36 (Tex. Crim. App. 2018).

The record shows that Jones suffered some harm.

First, **the entire jury charge** did nothing to ameliorate the error, and in fact exacerbated it. The only unanimity instruction in the charge told the jury that its verdict must be unanimous, but it did not explain what that meant.[84] The abstract portion set out the elements of murder under subsection (b)(1) and subsection (b)(2) without explaining that they are separate offenses with different elements.[85]

The **state of the evidence** was that Alexandria had died and that a man identified as Jones had shot her in the face. While this evidence was legally sufficient to convict, it does not change the fact that Jones was entitled to have the jury unanimously decide *which* elements he committed beyond a reasonable doubt.

The **jury arguments** mostly clearly reveal the harm in this case. The prosecutor immediately piggybacked on the jury charge and told the jury that they did not have to be unanimous "as to each type" to convict Jones of murder.[86] The prosecutor argued that Jones "either intended to kill her, knowingly wanted to kill her, or he wanted to … cause[] bodily harm to her," thus inviting the jury to treat these separate elements as interchangeable.[87]

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[84] CR:426.

[85] CR:420.

[86] RR6:167.

[87] RR6:168.

The **other relevant information** in this record is voir dire. The court emphasized to the panel that the jury must be unanimous,[88] but then the prosecutor specifically told the panel that there are "two ways" to prove murder, and that the jury does "not have to be unanimous on which way we prove."[89] The prosecutor even told the jury that 6 jurors could believe (b)(1) murder, while the other 6 could believe (b)(2) murder, and the jury could convict despite being evenly split.[90]

Put together, these facts show that Jones suffered "some harm" from the erroneous instruction. Because Jones objected to the charge, this Court does not have to assess the *degree* of that harm. *Arline*, 721 S.W.2d at 351. The presence of harm is enough. The court's instruction was error, and it was harmful. This Court must reverse the judgment of conviction and remand for a new trial. Tex. R. App. P. 43.2(d).

[88] RR3:27.

[89] RR3:116–17.

[90] RR3:117.

Issue Two
(Enhancement)

2. The evidence is legally insufficient to prove the habitual enhancement sequence.

When the trial court assessed punishment at 75 years, it also found that the State had proved the enhancement paragraphs, which set the range of punishment at 25–99 years or life in prison.[91] Tex. Penal Code § 12.42(d).

But the prior convictions were not in the correct sequence, so the evidence is legally insufficient to prove the enhancement sequence, and this Court should reverse and remand for a new punishment hearing.

2.1. To prove a habitual enhancement sequence, the State must prove that the defendant had two prior consecutive final felony convictions.

To enhance the punishment range of a felony to 25–99 years or life, the State must allege and prove a specific chronological sequence of prior felony convictions: 1) the first conviction becomes final; 2) the offense leading to a later conviction is committed; 3) the later conviction becomes final; 4) the offense for which the defendant presently stands accused is committed. Tex. Penal Code § 12.42(d); *Jordan v. State*, 256 S.W.3d 286, 290–91 (Tex. Crim. App. 2008). A

[91] RR7:123.

conviction is considered "final" on the date sentence was imposed if the defendant did not appeal it. *Jones v. State*, 77 S.W.3d 819, 823–24 (Tex. Crim. App. 2002); *Davy v. State*, 525 S.W.3d 745, 752 (Tex. App.—Amarillo 2017, pet. ref'd).

2.2. The State failed to prove that the second prior felony was committed after the first prior felony became final.

In this case, the State *alleged* this sequence—

1) Jones was convicted of Burglary on April 12, 2016;
2) Jones committed Robbery;
3) Jones was finally convicted of Robbery on April 5, 2019;
4) Jones committed Murder in the instant case on September 23, 2022.[92]

—but it *proved* this sequence—

1) Jones committed Burglary in 2015;
2) Jones also committed Robbery in 2015;
3) Jones was finally convicted of Burglary on April 12, 2016;
4) Jones was finally convicted of Robbery on April 5, 2019;
5) Jones committed Murder in the instant case on September 23, 2022.[93]

—which is in the wrong order. Here's how the State messed up:

The State sought to prove the enhancement sequence with State's Exhibit 102—certified records from the California Department of

[92] CR:49.

[93] RR7:22–25; RR8:250–51, 252, 255–56.

Corrections and Rehabilitation.[94] That exhibit contains three documents titled "Felony Abstract of Judgment," each from a different county in California.[95]

The first abstract is from the Superior Court of Orange County, in cause number 15WF1846.[96] This was the first prior conviction alleged in the indictment.[97] The abstract shows that Jones was convicted of Burglary and sentenced to four years' imprisonment—two years for the offense, and two more years for an enhancement.[98] The "Date of Conviction," "Date of Hearing," and "Date Sentence Pronounced" are all listed as April 12, 2016.[99] The abstract reflects that the conviction was the result of a plea, and it does not indicate that Jones appealed.[100] The abstract also reflects the "YEAR CRIME CMMTD" as "15."[101]

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[94] RR7:15–36; RR8:247–63 (SE 102).

[95] A "Felony Abstract of Judgment" is a form, prescribed by the Judicial Council of California, that is provided to officers to facilitate the execution of a court's order of imprisonment, confinement, or probation. Cal. Penal Code §§ 1213(a), 1213.5. It "is not the judgment of conviction," but rather a commitment order. *People v. Mitchell*, 26 P.3d 1040, 1042–43 (Cal. 2001). The most recent version of the form is available at https://www.courts.ca.gov/documents/cr290.pdf.

[96] RR8:250.

[97] CR:49.

[98] RR7:22; RR8:250.

[99] RR8:250–51.

[100] RR8:250–51.

[101] RR8:250.

The second abstract is from the Superior Court of Los Angeles County, in cause number YA093173-01.[102] It shows that Jones was convicted of "Possession of firearm by a felon-one prior" and sentenced to two years' imprisonment.[103] The "Date of Conviction," "Date of Hearing," and "Date Sentence Pronounced" are all listed as September 12, 2016.[104] The abstract reflects that the conviction was the result of a plea, and it does not indicate that Jones appealed.[105] The abstract also reflects the "YEAR CRIME COMMITTED" as "2015."[106]

The third abstract is from the Superior Court of Riverside County, in cause number RIF1704344.[107] This was the second prior conviction alleged in the indictment.[108] The abstract shows that Jones was convicted of "2nd Robbery" and sentenced to three years' imprisonment.[109] The "Date of Conviction" is listed as March 1, 2019, while the "Date of Hearing" and "Date Sentence Pronounced" are

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[102] RR8:252. This conviction was not alleged in the indictment or in any other notice of intent to use prior convictions. CR:49, 217–18. It is set out here simply to fully describe the contents of State's Exhibit 102.

[103] RR7:23; RR8:252.

[104] RR8:252.

[105] RR8:252.

[106] RR8:252.

[107] RR8:255.

[108] CR:49.

[109] RR7:24–25.

both listed as April 5, 2019.[110] The abstract reflects that the conviction was the result of a plea, and it does not indicate that Jones appealed.[111] The abstract also reflects the "YEAR CRIME COMMITTED" as "15."[112]

The State introduced no evidence of the specific date that any of these offenses were committed. In fact, the State's witness who described the abstracts at trial affirmed on cross-examination that "we don't know when the actual crimes that he pled guilty to were committed."[113]

Instead, the only evidence in the record of the date each offense was committed is the statement in each abstract that the year each crime was committed was "15" or "2015." The Dallas Court of Appeals has concluded that a two-digit "year" of commission listed in a California abstract indicates the year the offense was committed. *Rockwell v. State*, No. 05-10-00216-CR, 2011 WL 3690042, at *15 (Tex. App.—Dallas Aug. 24, 2011, no pet.) (mem. op., not designated for publication) (finding that commitment form stating that a crime was committed in "94" was sufficient to prove that the

[110] RR8:255–56.

[111] RR8:255–56.

[112] RR8:255.

[113] RR7:33. Thus, even if this Court were to ignore the abstracts' statements of the year the crimes were committed, the evidence would still be legally insufficient to prove the proper enhancement sequence.

crime was committed subsequent to a 1993 conviction). Accordingly, this Court may conclude that the abstracts' statements that the burglary and robbery crimes were committed in "15" means that both offenses were committed in 2015.

Because the robbery offense was committed in 2015, it was committed *before* the burglary conviction became final. That isn't a proper sequence for habitual enhancement, and the evidence is therefore legally insufficient to prove the enhancement sequence. Tex. Penal Code § 12.42(d); *Jordan*, 256 S.W.3d at 290–91.

2.3. This Court must reverse and remand for a new punishment hearing because the State's failure to prove the proper enhancement sequence is never harmless and requires reversal.

Because the evidence is legally insufficient to prove the enhancement sequence, this Court must remand the case for a new punishment hearing. *Jordan*, 256 S.W.3d at 292–93; *Hunter v. State*, 513 S.W.3d 638, 643 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

The Court of Criminal Appeals has repeatedly held that if the State fails to prove the proper enhancement sequence, the reviewing court must reverse and remand for a new punishment hearing because such a failure of proof is a sufficiency-of-the-evidence deficiency that can "never be considered harmless." *Ex parte Miller*,

330 S.W.3d 610, 624 (Tex. Crim. App. 2009); *Jordan*, 256 S.W.3d at 292–93.

This is because the punishment phase of trial involves a "dual deliberation process." *Jordan*, 256 S.W.3d at 293. First, the factfinder (in *Jordan*, the jury; here, the judge[114]) determines the range of punishment applicable to the primary offense by making a historical fact determination that the enhancement allegations are true. *Id.*

Only then is the factfinder free within those parameters to exercise the discretionary, normative function of assessing punishment. *Id.* Because there is no way to quantify what impact an unsupported finding of true had on the normative sentencing function, any attempt to calculate its effect would be pure speculation. *Id.*

Here, the ordinary range of punishment for murder is 5–99 years or life and an optional fine up to $10,000. Tex. Penal Code § 12.32. By finding the enhancement sequence to be proved, the trial court raised the minimum sentence by two decades, from 5 years to 25 years. Tex. Penal Code § 12.42(d); *Jordan*, 256 S.W.3d at 292–93.

When the court assessed a 75-year sentence, it was working within incorrect parameters while exercising its sentencing

[114] *Jordan* applies even when the judge determines punishment. *See Hunter*, 513 S.W.3d at 640, 643 (reversing and remanding for new punishment hearing based on insufficient evidence of enhancement sequence when trial judge assessed punishment).

discretion. *Jordan*, 256 S.W.3d at 293. There is simply no way for this Court to quantify what effect the unsupported enhancement finding and 20-year-increased minimum had on the judge's normative sentencing decision. *Id.*

Accordingly, the State's failure to prove the proper enhancement sequence cannot be deemed harmless, and this Court must reverse the punishment portion of the trial court's judgment and remand for a new punishment hearing. *Id.*; *Hunter*, 513 S.W.3d at 643; Tex. Code Crim. Proc. art. 44.29(b); Tex. R. App. P. 43.2(d).

Issues Three, Four, and Five (Judgment & Bill of Costs)

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

Authority to Modify Judgment and Bill of Costs

This Court has the authority to modify the trial court's judgment to make the record speak the truth when it has the necessary information to do so. Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992).

This Court also may modify a bill of costs on appeal because the bill of costs obligates an appellant to pay the items listed. *Jones v. State*, 691 S.W.3d 671, 679 (Tex. App.—Houston [14th Dist.] 2024, pet ref'd). A court of appeals may modify the bill of costs independent of finding errors in the trial court's judgment. *Pruitt v. State*, 646 S.W.3d 879, 883 (Tex. App.—Amarillo 2022, no pet.); *Bryant v. State*, 642 S.W.3d 847, 850 (Tex. App.—Waco 2021, no pet.); *Dority v. State*, 631 S.W.3d 779, 794 (Tex. App.—Eastland 2021, no pet.); *see also Contreras v. State*, Nos. 05-20-00185-CR, 05-20-00186-CR, 2021 WL 6071640, at *8 (Tex. App.—Dallas Dec. 23, 2021, no pet.) (mem. op., not designated for publication); *see also* Tex. R. App. P. 43.6 (court of appeals "may make any … appropriate order that the law and the nature of the case require").

3. This Court should modify the judgment to reflect that Jones did not plea to the enhancement paragraphs at all or that he pleaded "not true."

The first error in the judgment is a statement that Jones "PLEADED TRUE" to both enhancement paragraphs.[115] This is wrong. The record does not show that the trial court asked Jones to plead to the enhancements or that Jones entered a plea to them.[116] Jones pleaded not guilty to the indictment, however, and defense counsel contested the enhancements during the punishment phase and argued that the State had not met its burden of proving them.[117]

In the absence of the record affirmatively showing the contrary, this Court must presume that Jones was arraigned and entered a plea to the enhancements. Tex. R. App. P. 44.2(c)(3), (4). But nothing in that rule requires this Court to presume that the plea was "true."

In fact, the Court of Criminal Appeals has held that when the record shows, as it does here, a plea of not guilty to the indictment and that the defendant disputed his guilt and punishment, the reviewing court will not presume that he pleaded true to the enhancement paragraphs. *Wood v. State*, 486 S.W.3d 583, 589 (Tex. Crim. App. 2016). The only other plea to the enhancement that this Court could presume under Rule 44.2(c) is "not true."

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[115] CR:430.

[116] RR7:7–123.

[117] RR4:19; RR7:107–112.

Accordingly, this Court should modify the judgment either to reflect that Jones did not plead to the enhancement paragraphs at all, or it should modify the judgment to reflect that he entered a plea of "not true." Tex. R. App. P. 43.2(b), 44.2(c).

4. This Court should reduce the cost assessment in the judgment by $85.

The second error in the judgment is an assessment of $290 in court costs and $355 in reimbursement fees, which are itemized in the "Criminal Bill of Cost."[118] The total assessment—$645—is $85 too much because the court improperly assessed a $5 witness-summoning fee for 17 subpoenas that were never served.[119]

4.1. The cost assessment may be challenged on appeal.

A defendant may challenge the costs imposed in a bill of costs for the first time on appeal when the costs are not imposed in open court and the judgment does not contain an itemization of the costs. *London v. State*, 490 S.W.3d 503, 507 (Tex. Crim. App. 2016).

Here, the assessed costs were not imposed in open court.[120] Nor were they itemized in the judgment.[121] Instead, an itemized "Criminal Bill of Cost" was issued by the District Clerk three days

[118] CR:430, 433.

[119] $5 × 17 = $85.

[120] RR7:123–24.

[121] CR:430.

later, on June 27, 2024.[122] Accordingly, Jones may challenge these costs on appeal. *London*, 490 S.W.3d at 507.

4.2. A court may not impose a cost for a service that was not performed, so it cannot impose a witness-summoning fee for an unserved subpoena.

A court is authorized to assess a $5 reimbursement fee for summoning a witness. Tex. Code Crim. Proc. art. 102.011(a)(3). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[123]

Accordingly, this Court has concluded that when nothing in the record demonstrates that a peace officer served a subpoena on a witness or conveyed or attached a witness, there is no basis for assessing fees related to summoning, attaching, or conveying witnesses. *Rhodes v. State*, 676 S.W.3d 228, 233 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (striking fees for "attach/convey witness" where there was no evidence that a peace officer served a subpoena on any witness or conveyed or attached any witness).

The First and Fifth Courts of Appeals have reached the same conclusion. *See Wilson v. State*, Nos. 05-22-00452-CR, 05-22-00453-CR, 2023 WL 4758470, at *2 (Tex. App.—Dallas July 26, 2023, pet.

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[122] CR:433 (showing that it was printed "6/27/2024").

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

ref'd) (mem. op., not designated for publication) (striking witness-service fees for two witnesses when the record showed that neither witness was summoned); *Robles v. State*, No. 01-16-00199-CR, 2018 WL 1056482, at *6 (Tex. App.—Houston [1st Dist.] Feb. 27, 2018, pet. ref'd) (mem. op., not designated for publication) (striking $10 of $25 witness fee when record showed that two of five subpoenas were never served).

4.3. The record shows that 17 subpoenas that were not served, so this Court should strike the $85 in fees that the trial court imposed for them.

In this case, the bill of costs shows that the court assessed $340 for "LEA Summon Witness."[124] At $5 per subpoena, this amount equates to 68 subpoenas—and, indeed, the record includes 68 subpoena applications and subpoenas.[125] But the record also shows that only 51 of the 68 subpoenas were served.

The 68 subpoenas issued in four batches. The first subpoena was to Memorial Hermann Southwest Hospital for records and an accompanying business records affidavit.[126] Two more subpoenas were to divisions of the Harris County Sheriff's Office for records and

[124] CR:433.

[125] CR:22–26, 133–69, 203–10, 238–307.

[126] CR:25–26.

accompanying business records affidavits.[127] Next, 33 witness subpoenas issued March 5, 2024, and commanded the witnesses to appear on April 15, 2024.[128] Finally, 32 witness subpoenas issued May 16, 2024, and commanded the witnesses to appear on June 17, 2024.[129]

The record contains a return for every subpoena, and these returns show which subpoenas were served.[130] The three business-record subpoenas were all returned "Executed."[131] Among the 33 subpoenas issued March 5, however, only 24 were returned "Executed,"[132] while 9 were returned "Un-Executed."[133] Similarly, among the 32 subpoenas issued May 16, only 24 were returned "Executed,"[134] while 8 were returned "Un-Executed."[135]

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[127] CR:207–10.

[128] CR:137–69.

[129] CR:244–307.

[130] CR:27–28, 170–202, 211–12, 308–99. The return for the medical-records subpoena appears twice. CR:27–28. The record also contains numerous duplicate returns for the May 16 subpoenas: there are 91 returns for only 32 subpoenas. CR:308–99. That means 59 are duplicates. CR:327–78, 386–92. The remaining 32 returns account for each subpoena that was issued on May 16. CR:308–26, 379–85, 393–99.

[131] CR:27, 211–12.

[132] CR:172–92, 194–96.

[133] CR:170–71, 193, 197–202.

[134] CR:308–26, 122, 396–99.

[135] CR:379–85, 394.

That's 51 "Executed" subpoenas and 17 "Un-Executed" subpoenas. The returns for the 17 "Un-Executed" subpoenas include the following descriptions of the "action taken to summon" the witness:

- No Method Attempted (x9):
  - Bad Address / Un Mappable[136]
  - Use the search menu to select the appropriate agency or an email address to effectuate service.[137]
  - THIS IS A BAD ADDRESS FOR THIS WITNESS ACCORDING TO A PREVIOUS COURT RETURN (x7)[138]
- Email (x1):
  - Be advised that [witness] is not employed by [agency][139]
- Peace Officer (x6):
  - ***BAD ADDRESS***Personal service attempted. Location is a strip-center with multiple businesses. Provide a suit number and/or business name.[140]
  - ***BAD ADDRESS***Personal service attempted. Witness is no longer employed.[141]
  - ***BAD ADDRESS***No rental history for the witness. Personal service attempted. Current resident does not know the witness.[142]

[136] CR:170.

[137] CR:171.

[138] CR:379–85.

[139] CR:193.

[140] CR:197.

[141] CR:198.

[142] CR:199.

    - ******Bad/Old Address****** / Personal Service Attempted / Witness does not live at this address. / HOUSE BURNED DOWN.[143]
    - ***BAD ADDRESS*** Personal service attempted. No rental history for the witness.[144]
    - ***BAD ADDRESS*** Personal service attempted. The witness moved out 03/19/2019.[145]
- Not Employee (x1):
    - Be advised that [witness] is not employed by [agency]. / Be advised that [3 other names] were employed by [agency] but are no longer. Please contact our HR Department [email] for possible forwarding information.[146]

These returns are all like those quoted in *Wilson*—where one return said that the subpoena was "cancelled," and the other one said the witness was not served because of a "bad" address. *Wilson*, 2023 WL 4758470, at *2.

Here, the 17 "Un-Executed" returns show that none of the witnesses on those subpoenas were served or summoned. "It follows," as the Dallas Court said in *Wilson*, "that if the witnesses were not summoned, the service being charged for was not performed." *Id.*

[143] CR:200.

[144] CR:201.

[145] CR:202.

[146] CR:394.

Because "nothing in the record" demonstrates that a peace officer served 17 of the 68 issued subpoenas, there is no basis for $85 of the $340 assessed for summoning witnesses. *Rhodes*, 676 S.W.3d at 233. Accordingly, this Court should modify the judgment to reduce the amount of assessed costs by $85—from $645 to $560.

5. This Court should remove the assessed costs from the bill of costs because the trial court ordered that the costs are not payable until Jones is released from confinement.

The error in the bill of costs is that it includes any costs at all. The judgment orders the assessed court costs to be paid later,[147] but the record also contains a signed bill of costs, which makes the costs payable now.[148] This Court should modify the bill of costs to remove the not-yet-payable costs.

5.1. A trial court must assess costs in the judgment, but it may order in the judgment that the costs be payable later—including upon release from confinement.

In a criminal case where the punishment is anything other than a fine, the trial court must "adjudge the costs against the defendant[] and order the collection thereof as in other cases." Tex. Code Crim. Proc. art. 42.16.

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[147] CR:431.

[148] CR:433.

Additionally, during sentencing or immediately after imposing sentence in a case in which the defendant entered a plea in open court, the court must inquire on the record whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. Tex. Code Crim. Proc. art. 42.15(a-1). If the court determines that the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs, the court shall determine whether the fine and costs should be:

1) required to be paid at some later date or in a specified portion at designated intervals;
2) discharged by performing community service;
3) waived in full or in part; or
4) satisfied through any combination of these methods.

Id. When imposing a fine and costs, the court may direct a defendant:

1) to pay the entire fine and costs when sentence is pronounced;
2) to pay the entire fine and costs at some later date; or
3) to pay a specified portion of the fine and costs at designated intervals.

Id. art. 42.15(b).

The requirement that this inquiry be conducted on the record is subject to procedural default and is forfeited by counsel's failure to

object. *Cruz v. State*, No. PD-0628-23, ___ S.W.3d ___, 2024 WL 4031525, at *6 (Tex. Crim. App. Sept. 4, 2024).

Nevertheless, at least one court of appeals has concluded that, even if no inquiry into the defendant's ability to pay appears on the record, the trial court has satisfied the directive in article 42.15(a-1)(1) by directing that a defendant pay costs at a later date. *See Bruedigam v. State*, No. 07-23-00429-CR, 2024 WL 2739395, at *2 (Tex. App.—Amarillo May 28, 2024, no pet.) (mem. op., not designated for publication) (citing *Sparks v. State*, No. 07-23-00215-CR, 2024 WL 1608773, at *2–3 (Tex. App.—Amarillo Apr. 12, 2024, no pet.) (mem. op., not designated for publication); *Mayo v. State*, 690 S.W.3d 103, 105–6 (Tex. App.—Amarillo 2024, pet. filed) (op. on reh'g); *Stanberry v. State*, No. 07-23-00194-CR, 2024 WL 538835 (Tex. App.—Amarillo Feb. 9, 2024, pet. filed) (mem. op., not designated for publication)).

And at least five courts of appeals—Corpus Christi–Edinburg, Austin, Amarillo, Eastland, and Tyler—have expressly concluded that a trial court's order that a defendant pay costs "upon release from confinement" constitutes an order that the costs be paid at a later date. *See Jones v. State*, No. 13-24-00081-CR, 2024 WL 3934536, at *10 (Tex. App.—Corpus Christi–Edinburg Aug. 26, 2024, pet. filed) (mem. op., not designated for publication); *Carradine v. State*, No. 03-24-00012-CR, 2024 WL 3731846, at *9–10 (Tex. App.—Austin

Aug. 9, 2024, no pet. h.) (mem. op., not designated for publication); *Garcia v. State*, No. 07-23-00318-CR, 2024 WL 3643786, at *1 (Tex. App.—Amarillo Aug. 2, 2024, no pet. h.) (mem. op., not designated for publication); *Polanco v. State*, 690 S.W.3d 421, 433–35 (Tex. App.—Eastland 2024, no pet.); *Sloan v. State*, 676 S.W.3d 240, 242 (Tex. App.—Tyler 2023, no pet.).[149]

5.2. The issuance of a bill of costs by a district clerk makes court costs payable immediately.

The assessed costs become payable upon the issuance of a signed bill of costs. That is because a cost is not payable by the person charged with the cost until a written bill containing the item of cost is produced, signed by the officer who charged the cost or the officer who is entitled to receive payment of the cost, and provided to the person charged with the cost. Tex. Code Crim. Proc. art. 103.001(b). A district clerk is authorized to collect court costs. Tex. Code Crim. Proc. art. 103.003(a). Thus, once issued, the bill of costs "obligates" an appellant "to pay the items listed." *Jones*, 691 S.W.3d at 679.

[149] Other courts have concluded similarly, albeit as part of a harmless-error analysis after finding error in the court's failure to conduct an on-the-record ability-to-pay inquiry. *See, e.g.*, *Almeida v. State*, No. 04-22-00669-CR, 2024 WL 4138759, at *2–3 (Tex. App.—San Antonio Sept. 11, 2024, no pet. h.); *Carter v. State*, No. 01-23-00739-CR, 2024 WL 3707829, at *8 (Tex. App.—Houston [1st Dist.] Aug. 8, 2024, no pet. h.) (mem. op., not designated for publication).

5.3. The trial court ordered Jones to pay court costs upon release from confinement, but the signed bill of costs makes the costs payable now, so this Court should modify the bill of costs to remove the premature costs.

In this case, the judgment assesses court costs, as required by the code of criminal procedure.[150] Tex. Code Crim. Proc. art. 42.16. The judgment also orders that the costs be paid later, upon release from confinement.[151] Even though the court did not conduct an on-the-record ability-to-pay inquiry during sentencing, and Jones did not object to that failure, the court nevertheless wrote in the judgment:

> Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office or any other office designated by the Court or the Court's designee to pay or arrange to pay any fines, court costs, reimbursement fees, and restitution due.[152]

This order—that Jones pay court costs and reimbursement fees "[u]pon release from confinement"—constitutes an order that the costs be paid at a later date—namely, about 75 years from now. It therefore satisfies the directives of article 42.15(a-1). *Polanco*, 690 S.W.3d at 433–35; *Bruedigam*, 2024 WL 2739395, at *2.

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[150] CR:430.

[151] CR:431.

[152] CR:431.

But while the trial court ordered that the costs be paid later, the record includes a bill of costs that itemizes the cost assessment and is signed on behalf of the Harris County District Clerk by a deputy.[153] That signed bill of costs makes the costs payable now rather than later, and it "obligates" Jones "to pay the items listed." Tex. Code Crim. Proc. art. 103.001(b); *Jones*, 691 S.W.3d at 679.

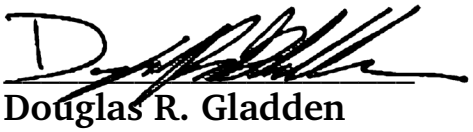
The bill of costs therefore conflicts with the trial court's judgment. The solution here is for this Court to modify the bill of costs and remove the not-yet-payable costs. *See Bruedigam*, 2024 WL 2739395, at *2 (ordering clerk to remove costs from the bill of costs in accordance with trial court's order); *Pruitt*, 646 S.W.3d at 883 (court of appeals has authority to modify bill of costs). This Court should modify the bill of costs accordingly.

[153] CR:433.

Prayer

Jones prays that this Honorable Court reverse the trial court's judgments and remand for a new trial and punishment hearing.

Respectfully submitted,



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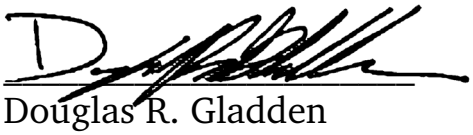

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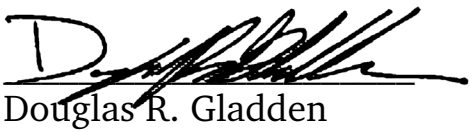

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