NO. 01-24-00562-CR
NO. 01-24-00567-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

JAMES MICHAEL SOTELO
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Numbers 1715366 & 1720032
From the 232nd Judicial District Court of Harris County, Texas
Hon. Josh Hill, Judge Presiding

BRIEF FOR APPELLANT

Oral Argument Not Requested

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

FERNANDA BENAVIDES
Assistant Public Defender
TX Bar No. 24120485
1310 Prairie, 4th Floor
Houston, Texas 77002
Ph. (713) 274-6700
Fax. (713) 368-9278
fernanda.benavides@pdo.hctx.net

JANI MASELLI WOOD
Assistant Public Defender
TX Bar No. 00791195
1310 Prairie, 4th Floor
Houston, Texas 77002
Ph. (713) 274-6700
Fax. (713) 368-9278
jani.maselli@pdo.hctx.net

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:	James Michael Sotelo TDCJ # 02516794 Dolph Briscoe 1459 West Highway 85 Dilley, TX 78017
PROSECUTORS:	Kyle Tucker, Trial Prosecutor Jessica Caird, Appellate Prosecutor Harris District Attorney's Office Harris County, Texas 1201 Franklin St. Suite 600 Houston, Texas 77002 (832) 927-5800
DEFENSE COUNSEL AT TRIAL:	Arthur C. Washington Attorney at Law 3730 Kirby Dr. Suite 1050 Houston, Texas 77098 (713) 522-4746
PRESIDING JUDGE:	Hon. Josh Hill 232nd Judicial District Court 1201 Franklin, 16th Floor Houston Texas, 77002 (832) 927-3850
COUNSEL FOR APPELLANT:	Fernanda Benavides Assistant Public Defender TX Bar No. 24120485 1310 Prairie, 4th Floor Houston, Texas 77002 Ph. (713) 274-6700 Fax. (713) 368-9278 fernanda.benavides@pdo.hctx.net Jani Maselli Wood Assistant Public Defender TX Bar No. 00791195 1310 Prairie, 4th Floor Houston, Texas 77002 Ph. (713) 274-6700 Fax. (713) 368-9278 jani.maselli@pdo.hctx.net

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STATEMENT OF THE CASE

Mr. Sotelo was charged in two separate indictments with the murder of Corey Thompson and aggravated assault causing serious bodily injury against Coy Rogers, stemming from events on March 20, 2021. (1 C.R. at 30; 2 C.R. at 26).[1] The State filed a motion to consolidate the trials on February 23, 2023, and that motion was granted by the Court on November 9, 2023. (1 C.R. at 56-58, 2 C.R. at 42-44). Jury selection began on November 9, 2023, with trial following. (1 R.R. at 3).[2] Mr. Sotelo was convicted by the jury of the charged offense of murder and the lesser included offense of deadly conduct on the aggravated assault causing serious bodily injury charge. (1 C.R. at 668; 2 C.R. at 98). On July 17, 2024, the Court held a punishment hearing and orally pronounced sentence at 40 years for the murder conviction to run concurrent with the 2-year deadly conduct sentence at the Texas Department of Criminal Justice. (8 R.R. at 26-27).[3] On July 19, 2024, the Court issued its judgment imposing the sentences. (1 C.R. at 678-680; 2 C.R. at 130-132). That same day, Mr. Sotelo filed timely notice of appeal for both convictions. (1 C.R. at 684-685; 2 C.R. at 136-137). A motion for new trial was not filed in this case.

[1] The Clerk's Record on appeal for the murder conviction is designated by "1 C.R." followed by the page number. The Clerk's Record on appeal for the deadly conduct conviction is designated by "2 C.R." followed by the page number.

[2] The Reporter's Record on appeal is designated by volume number, followed by "R.R." followed by page number.

[3] Volume 8 of the Reporter's Record indicates that the punishment proceedings took place on July 17, 2023. The correct date of these proceedings is July 17, 2024.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 38.1(e), Appellant's counsel does not request oral argument.

ISSUES PRESENTED

Issue Number One
No person shall be held to answer for a criminal offense unless on a grand jury's sufficient indictment. This non-forfeitable, constitutional right belongs to a defendant. Here, the indictments were not signed by the grand-jury foreman, so they were insufficient. The trial court tried and convicted Appellant anyway. He did not complain about the indictments' insufficiency at trial. A statute says he thereby forfeited his right to appeal the issue. Is the statute constitutional?

Issue Number Two
Trial Counsel provided ineffective assistance of counsel in failing to know the range of punishment for murder. Appellant's reliance on trial counsel's misunderstanding of the law is reflected from the record and that reliance harmed him. Applying the *Doctrine of Chances* further shows that Appellant was prejudiced and suffered harm by trial counsel's failure.

Issue Number Three
Appellant was improperly ordered to pay separate court costs for each conviction; a court may only assess these costs once because Appellant was tried in one criminal action.

Issue Number Four
The trial court improperly imposed $105 in costs for 21 un-executed subpoenas; a court may not impose a cost for a service that was not performed.

Issue Number Five:
The Court must remove the assessed costs from the bill of costs because the trial court ordered that the costs are not payable until Appellant is released from confinement.

STATEMENT OF FACTS

James Sotelo's Version

James and Corey agreed to hang out

James Sotelo and Corey Thompson were best friends. (5 R.R. at 78). On March 19, 2021, Corey texted James asking to hang out and James agreed. (5 R.R. at 79). Living in the same neighborhood, James picked up Corey and they came back to James's house. (5 R.R. at 79-80). Once there, James entered his bedroom with Corey to drop off his gun under a pillow on his bed. (5 R.R at 80-81).

James and Corey did drugs

As they had done on prior occasions, James and Corey smoked some marijuana but then Corey asked James for a ride to pick up some acid. (5 R.R. at 82). James agreed and then drove Corey about 10 minutes away to pick up the acid and they returned to the house where Corey took a tab. (5 R.R. at 83). James did not participate, and this was the first time he had seen Corey drop acid. (5 R.R. at 84).

Coy joined James and Corey

They continued hanging out and were eventually joined by Coy Rogers, James's brother, around 10:00 p.m. and continued smoking marijuana in the garage for a couple of hours. (5 R.R. at 84-85). In addition to the marijuana, James and Corey also drank promethazine that night. (5 R.R. at 113-114). James decided to go to bed

between 12:00 a.m. and 1:00 a.m. while Corey and Coy proceed to play video games in Coy's bedroom. (5 R.R. at 86-87).

James shot Corey and Coy

Between 2:00 a.m. and 3:00 a.m., James was awakened by someone choking him in bed – at the time, he did not realize it was Corey. (5 R.R. at 91 & 116). James was on his back while the assailant choked him with both hands and a struggle ensued between them. (5 R.R. at 92). James's assailant then kept one hand on his neck and used his right hand to reach for James's gun that was under a pillow. (5 R.R. at 93-94, 132). They both grabbed hold of the gun, the gun went off a couple of times, and James gained control of the gun and kicked his assailant off the bed. (5 R.R. at 95, 103). James testified that the room was dark, but he could see the figure coming towards him, so he shot at the figure out of fear for his own life. (5 R.R. at 96, 104). James could not determine which way the figure was facing in the room since it was dark. (5 R.R. at 132). At the time, James did not know how many shots he fired nor that one of the bullets went through a wall and hit his brother Coy. (5 R.R. at 97). Everything happened in a matter of 5 to 8 seconds. (6 R.R. at 32).

Upon walking out of the bedroom, James ran into his father Brett Sotelo, who had been awoken by the gunshots, and tells him *he tried to kill me*. (5 R.R. at 44, 98; 6 R.R. at 33;). Brett opened Coy's bedroom door and learned he was injured, and he and James tried to help him. (5 R.R. at 47; 6 R.R. at 33). James returned to the

bedroom to retrieve the gun and noticed that Corey was not moving. (5 R.R. at 98). Brett testified that he saw Corey laying on the bed and knew he was injured. (5 R.R. at 48).

James tosses the gun and the drugs

Prior to the police arriving, James tossed the gun and his backpack with the marijuana over the fence to the neighbor's yard because he did not want to get in trouble for the drugs and did not want to risk the police shooting him if they saw the gun. (5 R.R. at 106-107).

Trial counsel's argument at trial

At trial, defense counsel argued that James shot Corey in self-defense and criticized law enforcement's handling of the case due to their failure in requesting drug testing for anyone. (7 R.R. at 57-60).

The State's Presentation of Evidence

James shot Corey 11 times in the back

The State opened its case alleging that on March 20, 2021, James gunned down Corey shooting him 11 times on the back and, in the process, shot Coy in the head. (3 R.R. at 22-23).

Detective Culp investigated the scene

Detective Joseph Culp, the lead crime scene investigator on this case, was dispatched to 11414 Trudeau in Houston, Texas on the night of the shooting. (3 R.R. at 46). In James's room, Detective Culp encountered Corey's body lying on the bed with fired gun casings around him. (3 R.R. at 54). Two casings were located under Corey's body as well which Detective Culp testified would be impossible absent his body having been moved post shooting. (3 R.R. at 98). He also located marijuana residue and promethazine in the same room. (3 R.R. at 54-55). Detective Culp testified as to the trajectories of the bullets and indicated that they all originated from James's room. (3 R.R. at 79-85). Detective Culp located the firearm used in the shooting in the backyard (3 R.R. at 60). After the initial investigation, Detective Culp was called back to the scene because a neighbor found a backpack in their backyard; a search of the backpack revealed marijuana and identifying information of James. (3 R.R. at 85-86, 89).

The expert witnesses

The State had numerous expert witnesses that provided testimony on this case. Dr. Roger Milton testified as the medical examiner, although he did not personally conduct the autopsy, and determined that Corey had 11 gunshot wounds. (4 R.R. at

14, 22).[4] Jason Schroeder offered testimony regarding the gun shot residue, although he did not analyze the samples himself, and determined that both of James's hands tested positive which were likely a result of firing a weapon or being near a discharged firearm. (4 R.R. at 106, 110).[5] Tammy Taylor, the DNA analyst on the case, testified that James's likelihood ratio of being a contributor to the gun fell into the very strong category. (4 R.R. at 25).

The State, in arguing against James's self-defense claim, emphasized that Corey was shot 11 times in the back. (7 R.R. at 50).

The Verdict and Sentence

On November 20, 2023, the jury returned two verdicts. On the murder case, the jury found James guilty as charged in the indictment. (7 R.R. at 89; 1 C.R. at 668). On the aggravated assault causing serious bodily injury case, the jury found James guilty of the lesser included offense of deadly conduct. (7 R.R. at 89; 2 C.R. at 98).

8 months after the verdicts, on July 17, 2024, the Court held a punishment hearing and orally pronounced its sentence at 40 years for the murder conviction to run concurrent with the 2-year deadly conduct sentence at the Texas Department of

[4] Dr. Garret Phillips performed the autopsy on Corey Thompson and prepared the autopsy report. (4 R.R. at 19).
[5] Kristina May analyzed the gunshot residue kit for James Sotelo. (4 R.R. at 106).

Criminal Justice. (8 R.R. at 26-27).[6] On July 19, 2024, the Court issued its judgment imposing the sentences. (1 C.R. at 678-680; 2 C.R. at 130-132).

SUMMARY OF THE ARGUMENT

Appellant advances 5 issues on appeal.

Issue One

Appellant asserts the indictments were insufficient to mandate trial on the merits. Specifically, the indictments were signed by an assistant grand jury foreman instead of the grand jury foreman. (1 C.R. at 30; 2 C.R. at 26). Because these indictments were insufficient, the trial court had no personal jurisdiction over Appellant. Nevertheless, the Court conducted a trial and entered a judgment of conviction against him.

Appellant did not complain about the insufficiency of the indictments in the trial court, and Article 1.14(b) of the Code of Criminal Procedure would seem to foreclose him from complaining for the first time on appeal. However, an accused's right to an indictment is a category-two, waivable-only right under *Marin v. State*. See *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993). Thus, the right cannot be forfeited through inaction.

[6] Volume 8 of the Reporter's Record indicates that the punishment proceedings took place on July 17, 2023. The correct date of these proceedings is July 17, 2024.

Appellant argues that Article 1.14(b) is facially unconstitutional insofar as it purports to make the right to a sufficient indictment forfeitable. The right to an indictment derives from Article I, Section 10 of the Texas Constitution. TEX. CONST. art. I, § 10. Article I is part of the Texas Bill of Rights. Guarantees in the Texas Bill of Rights "shall forever remain inviolate." TEX. CONST. art. I, § 29.

If this Court grants Appellant's first issue, there will be no judgments of conviction in these cases due to a lack of jurisdiction. This means the rest of Appellant's issues are moot. This Court need not address them. Only if this Court overrules Appellant's first issue should the remaining issues be addressed.

Issue Two

In his second issue, Appellant asserts that trial counsel provided ineffective assistance of counsel. During his closing summation regarding what punishment the trial court should impose, Appellant's trial counsel asked the court to impose a probation sentence against Appellant. (8 R.R. at 14-15, 17-18). However, Appellant was not legally eligible for a probation sentence because he was convicted of murder – a conviction for which Texas statutory law does not authorize neither a judge nor a jury to impose a probation sentence on. TEX. CRIM. PROC. arts. 42A.054(a)(2), 42A.056(3). Trial counsel's failure to know the range of punishment for a murder conviction is clear from the record given that Appellant signed off on a Motion for Community Supervision at the start of trial, and trial counsel continued to request probation 8 months later at the punishment phase. (1 C.R. at 627; 2 C.R. at 87; 8 R.R.

at 14-15, 17-18). Trial counsel's performance was deficient, and requesting probation after a murder conviction cannot be shielded under the guise of strategy. As such, Appellant satisfies the first prong of *Strickland*.

Appellant asserts that trial counsel's deficient performance prejudiced him, satisfying prong two of *Strickland*. Appellant's *Motion for Community Supervision* coupled with the numerous requests and misstatements of law from trial counsel at the punishment phase can only lead to the conclusion that Appellant believed he was eligible for probation. Although Appellant was ineligible for a probation sentence from neither the Court nor the jury, perhaps trial counsel's request for it – on a murder conviction no less – rises to per se ineffectiveness.

In addition to the foregoing, Appellant asserts that the *Doctrine of Chances* is an instructive principle that this Court should utilize in finding that Appellant suffered prejudice by his trial counsel's representation. Appellant's trial counsel has been met with a prior allegation of ineffective assistance of counsel based on a range of punishment issue. Similarly, Appellant finds himself making the same allegation against the same trial counsel.

Accordingly, this Court should find that Appellant's trial counsel was ineffective, and that Appellant suffered prejudice. This Court should remand for a new trial.

Issue Three

The trial court improperly ordered Appellant to pay duplicate court costs when it assessed $290 in court costs in each of the convictions against him. (1 C.R. at 678; 2 C.R. at 130). Appellant's two criminal cases were consolidated into one trial and the court therefore only had authority to assess one set of court costs against Appellant. (1 C.R. at 56-58, 2 C.R. at 42-44); TEX. CODE CRIM. PROC. art. 102.073(a). Appellant requests this Court to remove the assessment of court costs of $290 from one of the judgments.

Issue Four

The trial court improperly imposed $105 in costs against Appellant for 21 un-executed subpoenas. Per the bill of costs, the trial court assessed a $5 witness-summoning fee for each of the 167 subpoenas in the record, totaling $835. (1 C.R. at 681). From the record, 21 of those subpoenas were not served. (1 C.R. at 110, 130, 133, 136, 142, 170, 215, 250, 258, 259, 265, 277, 292, 295, 298, 357, 441-443, 468, 542).

It was improper for the court to assess costs for the 21 subpoenas that were not served, because a court does not have the power to assess a cost for a service that was not performed. TEX. CODE CRIM. PROC. art. 103.002. At $5 per subpoena, the court improperly assessed $105 in witness-summoning fees for the 21 unserved subpoenas. This Court should therefore reduce the costs assessment against Appellant by $105 to remove the costs improperly assessed.

Issue Five

The itemized, issued, and signed bill of costs makes the costs assessed against Appellant payable now. (1 C.R. at 681; 2 C.R. at 133). However, the trial court ordered that the assessed costs are not payable until Appellant is released from confinement. (1 C.R. at 679; 2 C.R. at 131). The bill of costs and the trial court's order are in conflict. This Court should modify the bill of costs by removing all of the costs because they are not yet payable.

ARGUMENT

ISSUE ONE

No person shall be held to answer for a criminal offense unless on a grand jury's sufficient indictment. This non-forfeitable, constitutional right belongs to a defendant. Here, the indictments were not signed by the grand-jury foreman, so they were insufficient. The trial court tried and convicted Appellant anyway. Appellant did not complain about the indictments' insufficiency at trial. A statute says he thereby forfeited his right to appeal the issue. Is the statute constitutional?

The Indictment was not signed by the grand jury's foreperson.

The indictments in this case were signed by the *assistant* grand jury foreman. (1 C.R. at 30; 2 C.R. at 26).[7] The law does not envision this.[8] An indictment must be

[7] Both indictments are signed by "Asst. Foreman 176th Travis Taylor".

[8] Appellate counsel can find no statutory reference to an assistant grand jury foreman or foreperson. There are, however, many statutory references to the grand jury foreperson. See e.g., TEX. CODE CRIM. PROC.. arts. 19A.203, 20A.001, 20A.052, 20A.252, 20A.256, 20A.259, 20A.301, 20A.302, 20A.303. Notably, Article 19A.203(b) says:

> If the foreperson is for any reason absent or unable or disqualified to act, the court shall appoint another grand juror as foreperson.

signed by the grand jury's foreperson – not an assistant foreperson. Code of Criminal Procedure, Article 20A.302 makes this clear:

> (a) The attorney representing the state shall prepare, with as little delay as possible, each indictment found by the grand jury and shall deliver the indictment to the foreperson. The attorney shall endorse on the indictment the name of each witness on whose testimony the indictment was found.
>
> (b) The foreperson shall officially sign each indictment prepared and delivered under Subsection (a).

TEX. CODE CRIM. PROC. art. 20A.302

What difference does it make?

One may fairly ask whether the fact that the grand-jury foreperson did not sign the indictments in these cases makes any difference. The answer is yes. This is because an indictment that is not signed by the foreperson of the grand jury is "insufficient.[9] *Accord Hess v. State*, 528 S.W.2d 842, 843 (Tex. Crim. App. 1975) ("An indictment to be sufficient must give the day, month, and year of the commission of the offense.").

What makes an indictment sufficient?

Article 21.02 of the Code of Criminal Procedure is entitled "Requisites of an Indictment." The statute has not changed since 1965 and says:

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[9] The law simply does not envision an assistant grand jury foreperson. Article 20A.052(b) is consistent with this idea:

> The foreperson may appoint one or more of the grand jurors to act as clerks for the grand jury.

While the statute authorizes the foreperson to appoint clerks, the statute does not authorize the foreperson to appoint an assistant foreperson.

An indictment shall be deemed sufficient if it has the following requisites:

1. It shall commence, "In the name and by authority of The State of Texas".

2. It must appear that the same was presented in the district court of the county where the grand jury is in session.

3. It must appear to be the act of a grand jury of the proper county.

4. It must contain the name of the accused, or state that his name is unknown and give a reasonably accurate description of him.

5. It must show that the place where the offense was committed is within the jurisdiction of the court in which the indictment is presented.

6. The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation.

7. The offense must be set forth in plain and intelligible words.

8. The indictment must conclude "Against the peace and dignity of the State".

9. It shall be signed officially by the foreman of the grand jury.

TEX. CODE CRIM. PROC. art. 21.02

So, if an indictment contains each of the foregoing nine requisites, it is sufficient. It is merely a matter of logic to conclude that if the indictment is missing one of the nine requisites, then it must be insufficient. The indictments in these cases are insufficient because the ninth requisite was not satisfied -- they were not signed by the grand-jury foreman.[10] Again, one may fairly ask what difference this makes. In other words, so what if an indictment is insufficient?

[10] The Court of Criminal Appeals has explained "the purpose of the Code's requirement that each indictment be signed by the foreman." *Stigers v. State*, 702 S.W.2d 301, 302 (Tex. Crim. App. 1985).

For what purpose is an indictment deemed to be sufficient?

Article 21.02 says an indictment shall be deemed sufficient if nine specified requisites are satisfied. But the statute does not explicitly say what such an indictment is sufficient to do. So, for what purpose is an indictment deemed to be sufficient?

In *Dean v. State*, our Court of Criminal Appeals said, "When a legally constituted grand jury returns an indictment which is valid on its face, it is sufficient to call for a trial on the merits." *Dean v. State*, 749 S.W.2d 80, 82 (Tex. Crim. App. 1988) (emphasis added). See also *Crocker v. State*, 573 S.W.2d 190, 204 (Tex. Crim. App. [Panel Op.] 1978) ("an indictment returned by a legally constituted unbiased grand jury, if valid on its face, is sufficient to mandate trial of the charge on the merits.") (emphasis added); *Perkins v. State*, 902 S.W.2d 88, 102 (Tex. App.—El Paso 1995, pet. ref'd) (quoting Dean).

Thus, a sufficient indictment constitutes the indictment required by Article I, Section 10 of the Texas Constitution which, in pertinent part, says:

> **and no person shall be held to answer for a criminal offense. [sic] unless on an indictment of a grand jury**, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

TEX. CONST. art. I, § 10. Article I, Section 10 speaks of holding a person to answer for a criminal offense. And, of course, a person is held to answer for a criminal

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That purpose "is to ensure that the indictment presented is in fact the one voted on and returned by the grand jury." *Id.*

offense via a trial on the merits. So, the answer to our question is clear. To say a particular indictment is "sufficient" is to say the indictment is sufficient to bring the defendant to trial. In other words, the indictment is sufficient to give the trial court jurisdiction over the case. See *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001) "(A judgment of conviction for a crime is void when . . . the document purporting to be a charging instrument (i.e. indictment, information, or complaint) does not satisfy the constitutional requisites of a charging instrument, thus the trial court has no jurisdiction over the defendant") (internal footnote omitted).

By the same token, if an indictment is insufficient, then the person may not be brought to trial.

Is an indictment sufficient if the grand jury's foreman did not sign it?

No, the indictments in the current cases were insufficient. Being insufficient, the indictments were not an instrument through which a defendant could be brought to trial. But in *Riney v. State*, the Court of Criminal Appeals said a foreperson's signature is "not essential to the validity of an indictment." *Riney v. State*, 28 S.W.3d 561, 566 (Tex. Crim. App. 2000). These ideas seem to be at odds.

The *Riney* opinion cited *Tatmon v. State*. *Id.* at 566 (citing *Tatmon v. State*, 815 S.W.2d 588, 589 (Tex. Crim. App. 1991)). *Tatmon* Court relied on the 1976 case of *Owens v. State* and the 1968 case of *McCullough v. State*. *Owens v. State*, 540 S.W.2d 324 (Tex. Crim. App. 1976); *McCullough v. State*, 425 S.W.2d 359 (Tex. Crim. App. 1968).

Those two opinions followed a statute that was no longer in force as of January 1, 1966. That statute was Article 512, V.A.C.C.P. which said:

> Exceptions to the form of an indictment or information may be taken for the following causes only: . . . . . (2) The want of any other requisite or form prescribed by articles 396 and 414, except the want of the signature of the foreman of the grand jury, or in the case of an information, of the signature of the State's attorney.

See *Tatmon v. State*, 815 S.W.2d at 589.

The foregoing statute had been replaced by Article 27.09 of the Code of Criminal Procedure. The statute became effective on January 1, 1966. It reads the same today as it did in 1966. The statute says:

> Exceptions to the form of an indictment or information may be taken for the following causes only:
>
> 1. That it does not appear to have been presented in the proper court as required by law;
>
> 2. The want of any requisite prescribed by Articles 21.02 and 21.21.
>
> 3. That it was not returned by a lawfully chosen or empaneled grand jury.

TEX. CODE CRIM. PROC. art. 27.09

The *Owens* and *McCullough* opinions did not follow the new law. The two opinions concluded that the signature of the grand-jury foreman was not essential to an indictment's validity. Those conclusions would be correct under the old law. But they were incorrect under the new law. See *Tatmon v. State*, 815 S.W.2d at 590-91 (Baird, J., concurring). Judge Baird reached this conclusion in his concurrence of *Tatmon*, writing:

> I am constrained to concur in the result reached by a majority of this Court because of the doctrine of stare decisis. Otherwise, I would dissent. The majority bases its decision on *Owens v. State*, 540 S.W.2d 324 (Tex.Cr.App. 1976) and *McCullough v. State*, 425 S.W.2d 359 (Tex. Cr. App. 1968). *Tatmon v. State*, 815 S.W.2d 588, 589-90, (Tex.Cr.App. delivered this day). I believe those cases were wrongly decided because they relied on cases prior to the passage of Tex,CodeCrim.Proc.Ann. art. 27.09 without analyzing the obvious distinctions between that article and its predecessor, Tex.Code Crim.Proc.Ann. art. 512 (repealed 1966).

Id.

Under the law as it stands today, the signature of the grand-jury foreperson on an indictment is essential to its validity. The cases saying otherwise are all based on a law that was amended 58 years ago.

Can Appellant attack an insufficient indictment for the first time on appeal?

The indictments in the current cases were insufficient. And there is no question that "exception . . . may be taken" to an indictment lacking one of the nine requisites. TEX. CODE CRIM. PROC. art. 27.09(2). But there is very much a question as to whether Appellant can complain about this insufficiency now. Article 1.14 of the Code of Criminal Procedure purports to limit a defendant's ability to complain about an insufficient indictment on appeal. In pertinent part, Article 1.14(b) says:

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity **and he may not raise the objection on appeal** or in any other postconviction proceeding.

TEX. CODE CRIM. PROC. art. 1.14(b)

This statutory language is troubling to say the least. It means a person may be "held to answer for a criminal offense" even when the indictment is insufficient to mandate trial of the charge. See TEX. CONST. art. I, § 10; See *Crocker v. State*, 573 S.W.2d at 204. This violates the following provision contained in Article I, Section 10 of our Texas Constitution:

> no person shall be held to answer for a criminal offense. [sic] unless on an indictment of a grand jury.

TEX. CONST. art. I, § 10

In the 1971 case of *King v. State*, the Court of Criminal Appeals held that the foregoing right is waivable. See *Crocker v. State*, 573 S.W.2d at 204. By so holding, the Court found Code of Criminal Procedure, Article 1.141 does not violate Article I, Section 10. Article 1.141 is the provision authorizing criminal defendants to waive the right to be accused by indictment and be charged by an information instead.[11] Writing for the Court, Presiding Judge John Onion made one thing abundantly clear, however. While the right to be accused by indictment can be waived, it cannot simply be forfeited:

> Under the authority conferred by Article 1.141, supra, the trial court had jurisdiction to hear the cause, there being a valid waiver of an indictment. . . . It is well to bear in mind that a felony information acts in lieu of or as a substitute for an indictment and its validity is therefore essential to the court's jurisdiction. See *Wells v. Slack*, 115 Ohio App. 219, 184 N.E.2d 449 (1962). If an accused has

[11] Article 1.141 reads the same today as it did at the time of *King* in 1971:

> A person represented by legal counsel may in open court or by written instrument voluntarily waive the right to be accused by indictment of any offense other than a capital felony. On waiver as provided in this article, the accused shall be charged by information

> not effectively waived his right to an indictment in full accordance with the statute the felony information is void. An indictment is still mandatory in absence of a valid waiver.

King v. State, 473 S.W.2d at 51-52

King predated *Marin v. State* by over twenty years. *Marin v. State*, 851 S.W.2d at 275. *Marin*, of course, is the Court of Criminal Appeals' "watershed opinion in the law of error-preservation." *Proenza v. State*, 541 S.W.3d 786, 792 (Tex. Crim. App. 2017) (quoting *Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002)). While *King* predated *Marin*, the right to an indictment fits neatly into Marin's universe of category-two, waivable rights. As explained in *Marin*:

> Waivable rights, on the other hand, do not vanish so easily. Although a litigant might give them up and, indeed, has a right to do so, he is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record. *Goffney v. Stat*e, 843 S.W.2d 583, 585 (Tex. Crim. App. 1992). He need make no request at trial for the implementation of such rights, as the judge has an independent duty to implement them absent an effective waiver by him. As a consequence, failure of the judge to implement them at trial is an error which might be urged on appeal whether or not it was first urged in the trial court.

Marin v. State, 851 S.W.2d at 280

The following passage from *Marin* is also quite significant:

> "Forfeit" and "procedural default" are synonymous; both refer to the loss of a claim or right for failure to insist upon it by objection, request, motion, or some other behavior calculated to exercise the right in a manner comprehensible to the system's impartial representative, usually the trial judge. *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977). **Rights which are waivable only**, as well as absolute systemic requirements and prohibitions, **cannot be made subject to rules of procedural default because, by definition, they are not forfeitable**. Id. at 279. See *Proenza v. State*, 541 S.W.3d at 801 (category-two right cannot be forfeited and may be urged for first time on appeal).

Article 1.14(b) bears repeating:

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

TEX. CODE CRIM. PROC. art. 1.14(b)

This statutory language does exactly what the *Marin* case says cannot be done. It makes a waivable-only right (the right to an indictment) subject to a procedural default. This is unconstitutional on its face. The statute violates Article I, Section 10. This provision guarantees that a defendant will not be held to answer for a criminal offense unless on a grand jury's indictment.

Significantly, it should also be noted that the defendant's guarantee under Article I, Section 10 is part of the Texas Bill of Rights. The rights of defendants in our Bill of Rights have a special status. Section 29 of Article I makes this clear. Section 29 is entitled "Bill of Rights Excepted from Powers of Government and Inviolate." It reads in its entirety as follows:

> To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all law contrary thereto, or to the following provisions, shall be void.

TEX. CONST. art. I, § 29

Code of Criminal Procedure, Article 1.14(b) runs directly counter to the right to an indictment set out in Article I, Section 10 of the Constitution. Accordingly,

Article 1.14(b) is void. And a void law is of no effect. Accordingly, Article 1.14(b) presents no barrier to Appellant challenging the lack of a sufficient indictment for the first time on appeal.

Did the trial court have jurisdiction?

No. Appellant was forced to stand trial pursuant to two indictments that were insufficient to hold him to answer for a criminal offense. The trial court had no power to try him. There is no question that the trial court had subject-matter jurisdiction over the felony offenses in this case, but the trial court did not have personal jurisdiction over Appellant because there was not a sufficient indictment. As our Court of Criminal Appeals explained, both subject matter jurisdiction and personal jurisdiction are necessary to give a trial court jurisdiction over a criminal case:

> A trial court's jurisdiction over a criminal case consists of "the power of the court over the 'subject matter' of the case, conveyed by statute or constitutional provision, coupled with 'personal' jurisdiction over the accused, which is invoked in felony prosecutions by the filing of [an] indictment or information if indictment is waived."

State v. Dunbar, 297 S.W.3d 777, 780 (Tex. Crim. App. 2009) (quoting *Fairfield v. State*, 610 S.W.2d 771, 779 (Tex. Crim. App. 1981)).

Appellant was harmed

The Court of Criminal Appeals has said jurisdictional errors are not "categorically immune to a harmless error analysis." *Ex parte Moss*, 446 S.W.3d 786, 788-89 (Tex. Crim. App. 2014). But in the same opinion (*Cain v. State*), the Court said:

> [I]t may be true that some kinds of errors (particularly jurisdictional ones) will never be harmless under the Rule 81(b)(2) test and that some other kinds of errors will rarely be harmless.

Cain v. State, 947 S.W.2d at 264

Given that jurisdiction is not categorically immune to a harmless-error analysis, it is appropriate to address harm in this case. Here, the trial court had no personal jurisdiction over Appellant. Accordingly, the court had no power to issue a judgment in either case. See *Ex parte Moss*, 446 S.W.3d at 788 ("a lack of personal or subject-matter jurisdiction deprives a court of any authority to render a judgment"). The judgments the trial court did issue were void. *Gallagher v. State*, 690 S.W.2d 587, 589 (Tex. Crim. App. 1985) ("Judicial action without jurisdiction is void."). See also *Cleveland v. Ward*, 285 S.W. 1063, 1071 (Tex. 1926) (same). It was a complete nullity. *Nix v. State*, 65 S.W.3d at 667-68 (Tex. Crim. App. 2001); *Ex parte Seidel*, 39 S.W.3d 221, 225 (Tex. Crim. App. 2001). Obviously, Appellant has been harmed by being made subject to two judgments of conviction that are null and void. As announced by the Court of Criminal Appeals:

> A void judgment is a nullity from the beginning and is attended by none of the consequences of a valid judgment. It is entitled to no respect whatsoever because it does not affect, impair, or create legal rights.

Ex parte Seidel, 39 S.W.3d at 225. See also *Nix. v. State*, 65 S.W.3d at 667

To say the judgments of conviction against Appellant are harmless when it is entitled to no respect whatsoever would make no sense. Appellant has been harmed by the judgments against him.

ISSUE TWO

Trial Counsel provided ineffective assistance of counsel in failing to know the range of punishment for murder. Appellant's reliance on trial counsel's misunderstanding of the law is reflected from the record and that reliance harmed him. Applying the *Doctrine of Chances* further shows that Appellant was prejudiced and suffered harm by trial counsel's failure.

Standard of Review and Applicable Law: Strickland's two-pronged test

Texas courts adhere to the United States Supreme Court's two-pronged Strickland test to determine whether counsel's representation was inadequate so as to violate a defendant's Sixth Amendment right to counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986). The appellant must first show that counsel's performance was deficient, i.e., that his assistance fell below an objective standard of reasonableness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119, 117 S.Ct. 966, 136 L.Ede.2d 851 (1997); *Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993). Second, assuming the appellant has demonstrated deficient performance, it is necessary to affirmatively prove prejudice. *McFarland v. State*, 928 S.W.2d at 500. In other words, the appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Hernandez v. State*, 726 S.W.2d at 55. This two-pronged test is the benchmark for judging whether counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a reliable result. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992), *cert. denied*, 508 U.S. 963, 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993).

The assessment of whether a defendant received effective assistance of counsel must be made according to the facts of each case. *Ex parte Scott*, 581 S.W.2d 181, 182 (Tex. Crim. App. 1979). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d at 500. Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). "The defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994), citing to *Strickland*, 466 U.S. at 689. This may be difficult to overcome as "the record must demonstrate that counsel's performance fell below an objective standard of reasonableness as a matter of law, and that no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of his or her subjective reasoning." *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). "When the record is silent as to trial counsel's strategy, we will not conclude that appellant received ineffective assistance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it." *Lopez v. State*, 565 S.W.3d 879, 886 (Tex. App.—

Houston [14th Dist.} 2018, pet. ref'd), quoting *Goodspeed v. State*, 198 S.W.3d 390, 392 (Tex Crim. App. 2005).

While the Court of Criminal Appeals has been hesitant to "designate any error as per se ineffective assistance of counsel as a matter of law," it is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance. *Jackson v. State*, 766 S.W.2d 505, 508 (Tex. Crim. App. 1985) (failure of trial counsel to advise appellant that judge should assess punishment amounted to ineffective assistance of counsel). *See also Ex parte Felton*, 815 S.W.2d 733 (Tex. Crim. App. 1991) (failure to challenge a void prior conviction used to enhance punishment rendered counsel ineffective); *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 2046 n.20, 80 Led.2d 657 (1984). *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

Trial counsel asked the trial court to impose a probation sentence against Appellant after the murder conviction.

During his closing argument at the punishment phase, Appellant's trial counsel, Mr. Arthur C. Washington, asked the Court to impose a probation sentence against Appellant. (8 R.R. at 14). In arguing for probation on the murder and deadly conduct convictions, Mr. Washington stated:

> MR. WASHINGTON: We ask the Court consider the full range of punishment, including probation, and we do understand that probation in a murder case is a

rarity[12] and sometimes we ask jurors[13] if in fact that they can consider probation and include probation and give examples of what may be an appropriate circumstance. In this case Judge the reason why probation is appropriate is because of the defense and type of defense and also the evidence that was offered and tendered before the jury for their consideration, even though they decided Mr. Sotelo was guilty of murder. Underground reason we ask for probation is because of the self-defense although not accepted by the Jury is one that was presented and the reason presented under the circumstances.

(8 R.R. at 14)

Appellant was not legally eligible for a probation sentence after the murder conviction.

Article 42A.053 of the Texas Code of Criminal Procedure provides that:

(a) A judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty of nolo contendere, may:

(1) Suspend the imposition of the sentence and place the defendant on community supervision

TEX. CODE CRIM. PROC. art. 42A.053(a)(1)

However, Article 42A.054 explains that:

(a) Article 42A.053 does not apply to a defendant adjudged guilty of an offense under:

(2) Section 19.02, Penal Code (Murder)

TEX. CODE CRIM. PROC. Art 42A.054(a)(2)

[12] To trial counsel's point, it *is* a rarity to receive probation on a murder conviction; probation on a murder conviction has not been available since 1993. 1993 TEX. GEN. LAWS 3586, 3718.

[13] A jury could not have recommended probation after Appellant's murder conviction pursuant to Article 42A.056 of the Texas Code of Criminal Procedure; this code section states that "A defendant is not eligible for community supervision under Article 42A.055 if the defendant: (3) is adjudged guilty of an offense under Section 19.02, Penal Code." TEX. CODE CRIM. PROC. art. 42A.056(3)

Appellant faced a murder charge under Texas Penal Code 19.02, was adjudged guilty by the jury on said murder charge, and therefore was not eligible for community supervision from either the Court or the jury.

Trial counsel's performance was deficient per the standard set forth in Strickland.

Mr. Washington's decision to ask the trial court for probation was not the product of a strategic or tactical decision.[14] That decision was the product of not being aware that Appellant was not legally eligible for probation on the murder conviction. It was unreasonable and manifestly improper to ask the Court to consider probation and it could not have been the product of any legitimate trial strategy. Mr. Washington however continued to misstate the law throughout his closing argument at the punishment phase:

> MR. WASHINGTON: I suggest Mr. Sotelo can conduct himself appropriately. He was out on probation and he has an infraction where he didn't get home on time and a incident that was dismissed and so we're asking the Court to consider that. In the event the Court does not consider, I think that probation is appropriate then we move to what we now call full range of punishment. In regard to the low end, the five years

[14] Trial counsel did not request a lesser included offense of murder during the jury charge conference with the trial court and the State. (7 R.R. at 1-91). Trial counsel, however, did request a lesser included offense of deadly conduct. (7 R.R. at 29-30). Consequently, the record reflects that trial counsel presented an all or nothing defense (self-defense) regarding the murder charge. That is trial strategy. Had trial counsel requested a lesser included offense on murder, and the jury found Appellant guilty of the lesser included offense of criminally negligent homicide, then he would have been eligible for probation from a judge absent a deadly weapon finding. TEX. PEN. CODE §19.05; TEX. CODE. CRIM. PROC. arts. 42A.053, 42A.054(b). Deciding to not proceed on a request for a lesser on murder leads to one of two results – acquittal or a conviction with an automatic prison sentence. After a murder conviction, however, it is not strategy to request a sentence for which Appellant is not eligible.

> TDC and the greater end life in prison, we don't think that the greater end is appropriate here.

(8 R.R. at 15)

Again, Appellant was not eligible for Court-recommended nor jury-recommended community supervision. The sentence that the Court was legally authorized to consider was imprisonment "for life or for any term of not more than 99 years or less than 5 years" in the Texas Department of Criminal Justice on the murder conviction. TEX. PEN. CODE §12.32. From Mr. Washington's closing argument, it appears that he recognizes the range of punishment is 5 to 99 years in prison but recognizes it as an option only if the Court did not impose the probation sentence. To repeat:

> MR. WASHINGTON: In the event the Court does not consider, I think that probation is appropriate then we move to what we now call full range of punishment.

(8 R.R. at 15)

However, there is no moving from probation to the full range of punishment after an accused has been adjudged guilty of murder. There is only the full range of punishment to consider.

Here, no reasonable trial strategy can justify trial counsel's decision to ask for probation as Appellant was ineligible. No reasonable attorney would ask for a sentence that they know their client legally cannot receive. Mr.

Washington however persisted in his misunderstanding of the law in finishing his closing argument:

> MR. WASHINGTON: So I say that you will - - to say again we believe that the community would be safe with the correct programs. So for that we ask that if probation is not appropriate and we deem that it is, that the lower end of the scale would be more appropriate.

(8 R.R. at 17-18)

Mr. Washington's misunderstanding of the law preceded his erroneous closing argument at the punishment phase. On November 13, 2023, the first day of trial on the merits, Mr. Washington submitted a *Motion for Community Supervision* on both the murder and aggravated assault charges. (1 C.R. at 627; 2 C.R. at 87). This motion included Appellant's signature along with attestations that he had no felony convictions, had never been on community supervision for a felony offense, and that he requested the "judge presiding place me on community supervision." (1 C.R. at 627; 2 C.R. at 87). Eight months later, on July 17, 2024, Mr. Washington was still requesting community supervision for Appellant at the punishment hearing. (8 R.R. at 14-15, 17-18).

A reasonable lawyer would know whether their client is eligible for community supervision. Here, Mr. Washington did not understand the consequences of a murder conviction from the very beginning of trial and through the punishment phase. No competent attorney would have engaged in

this conduct. Thus, Mr. Washington's "performance fell below an objective standard of reasonableness as a matter of law." See *Lopez*, 343 S.W.3d at 143.

The record reflects that Appellant believed he would be eligible for probation, and he therefore suffered prejudice due to trial counsel's misunderstanding of the law

"[T]o show prejudice, the appellant 'must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceedings would have been different.'" *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009), citing to *Strickland*, 466 U.S. at 694. "Reasonable probability is a probability sufficient to undermine confidence in the outcome, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

After hearing the arguments of trial counsel and the State, the trial court sentenced Appellant to 40 years confinement in the Texas Department of Criminal Justice. (8 R.R. at 27). Although the record does not make the appellate court privy to the private conversations between trial counsel and Appellant, the record nonetheless affords sufficient information to show that Appellant believed community supervision was a possibility. (1 C.R. at 627; 2 C.R. at 87; 8 R.R. at 14-15, 17-18). From the *Motion for Community Supervision* to the numerous requests of the same by trial counsel at the punishment stage, this Court must acknowledge that a young man depending on an attorney – signing off on the motion for community supervision and hearing his attorney in open court argue for probation – would have held out hope for a

probation sentence. Appellate counsel acknowledges that when the record is silent, a reviewing court may not speculate to find trial counsel ineffective. See *Ex parte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001). Here, the record cannot be said to be silent based on the foregoing and there is no need to speculate when trial counsel himself misunderstood and misstated the law before the trial court without any correction.[15] Nothing in the record supports that trial counsel would have told Appellant any different. Appellant must have relied upon it both behind closed doors and before the tribunal when his own advocate argued for it.

The present case is different from *Powers v. State* and the conclusion reached there should not extend to Appellant. *Powers v. State*, 727 S.W.2d 313, 315 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd). In *Powers*, Mr. Powers entered a plea of guilty to the offense of aggravated robbery and the trial court assessed punishment at 10 years confinement. *Id.* at 314. There, Mr. Powers argued that the record reflected that both he and his counsel were unaware that he was statutorily ineligible for

[15] There was no correction as to Appellant being ineligible for probation from the Court. The State, in closing argument, stated "Well, probation is not appropriate factually." (8 R.R. at 18). However, that cannot rise to a correction when the fact is that Appellant was not legally eligible for probation irrespective of the facts of the case. TEX. CODE CRIM. PROC. art 42A.054(a)(2), TEX. CODE CRIM. PROC. art. 42A.056(3). In their concurrence for *Powers v. State*, Justice Levy wrote, "it is difficult for me to understand why the judge did not take the 30 seconds necessary to advise the appellant that he was ineligible by law to be granted probation…Judicial passivity, under these circumstances, undermines confidence in the fairness of the judicial process and is wholly ineffectual." *Powers v. State*, 727 S.W.2d 313, 317 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd) (Levy, J., concurring).

probation such that his plea was not knowingly or voluntarily entered. *Id.* The record reflected that an application for adult probation was filed, and that the attorney requested deferred adjudication at the punishment hearing 5 months later. *Id* at 316. In finding against Mr. Powers, the court held that Appellant was correctly advised that he was eligible for deferred adjudication given that the signed judgment of conviction came into being after the punishment hearing and, before then, the court's oral finding of guilty did not divest the court of power to grant subsequent deferred adjudication. *Id.* at 316-317.

Here, although Appellant filed motions for community supervision and his trial counsel requested probation at the punishment hearing, this case is not like Mr. Powers'. Specifically, Appellant did not enter a plea of guilty before the trial court but instead exercised his right to a jury and that jury found him guilty of murder. Further, the trial court could not have deferred Appellant's guilt after the jury's verdict as it was without power to do so. As such, the only similarities that Mr. Powers and Appellant have are that they filed motions for community supervision and that their trial counsel requested probation at the punishment hearing. However, Mr. Powers was technically eligible for deferred while Appellant was not eligible for any form of community supervision after the jury's guilty verdict on murder against him. As such, *Powers* is distinct from Appellant's case.

To support an ineffective assistance of counsel claim based on an attorney's mistake about probation eligibility from a court versus a jury, "the record must show

more than the mistake; it must also show whether and how the mistake influenced the defendant's punishment election." *Swinney v. State*, 663 S.W.3d 87, 92 (Tex. Crim. App. 2022). In *Swinney*, the Appellant wanted probation, but he was only eligible to receive it from a jury. *Id.* Despite that, his attorney argued for the trial court to assess punishment. *Id.* In finding lack of prejudice in this circumstance, the Court reasoned that there was nothing in the record to show "whether he would have elected the jury for punishment if his attorney had correctly advised him about his probation eligibility." *Id.* The Court emphasized that the focus is on "the impact of the bad advice on the defendant's decision making and does not require a showing of a different outcome." *Id.* at 89.

Here, Appellant was not eligible to receive a probation sentence from neither the trial court nor the Jury, but this should not deter this Court from finding that Appellant suffered prejudice. TEX. CODE CRIM. PROC. arts. 42A.054(a)(2), 42A.056(3). After all, a showing of a different outcome is not required. *Miller v. State*, 548 S.W.3d 497, 498 (Tex. Crim. App. 2018). Although the circumstances were different in *Swinney*, the issue remains that Appellant here – as evidenced from the record – relied on his trial counsel's misunderstandings of the law which in turn impacted his decision making. To find otherwise would be a legal fiction when there is sufficient evidence in the record demonstrating that Appellant both wanted probation and believed he was eligible. (1 C.R. at 627; 2 C.R. at 87; 8 R.R. at 14-15, 17-18). That belief of eligibility tainted the entire trial for Appellant. In *Swinney*, the Court wrote

that "Appellant wanted probation" but then disregarded that in further writing that "the record does not show a reasonable probability that the attorney's mistake about probation eligibility caused Appellant to waive the jury for punishment." *Swinney* 663 S.W.3d at 92. Those two statements cannot exist together. Here, the record reflects that Appellant wanted probation if he was found guilty even though he was not legally eligible to receive that sentence. (1 C.R. at 627; 2 C.R. at 87; 8 R.R. at 14-15, 17-18). Although the Court of Criminal Appeals has not designated any error as "per se ineffective as a matter of law," trial counsel's error here in requesting probation after a murder conviction must be so egregious in and of itself to constitute ineffective assistance. See *Jackson v. State*, 766 S.W.2d 505, 508 (Tex. Crim. App. 1985).

The "Doctrine of Chances" is instructive in this case for prong two of Strickland.

Texas courts recognize the "Doctrine of Chances" which tells us that "highly unusual events are unlikely to repeat themselves inadvertently or by happenstance." *De La Paz v. State*, 279 S.W.3d 336, 347 (Tex. Crim. App. 2009).

Texas courts have utilized the doctrine of chances in determining the relevance and admissibility of extraneous offenses where the material issue addressed in the case is the defendant's intent to commit the offense charged. *Plante v. State*, 692 S.W.2d 487, 491 (Tex. Crim. App. 1985), *holding modified by Harrell v. State*, 884 S.W.2d 154 (Tex. Crim. App. 1994). To give the extraneous offense probative value, it is necessary that the prior act be similar since "it is the improbability of a like result being repeated

by mere chance that carries probative weight." *Id.* at 492. An accused may also utilize the doctrine of chances defensively if the series of unusual events tends to negate the defendant's guilt of the crime charged. *Fox v. State*, 115 S.W.3d 550, 561 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Although the doctrine of chances has not been applied to a claim of ineffective assistance of counsel,[16] the concept itself – that similar events are unlikely to be innocent – is instructive in this case.

Trial counsel's prior allegation of ineffective assistance of counsel, due to improper advice on range of punishment, may be more than mere happenstance when reviewed with Appellant's case

In *Terrell v. State*, Mr. Terrell contended that he received ineffective assistance of counsel because his trial counsel failed to advise him properly of the full range of punishment before he rejected a plea-bargain offer. *Terrell v. State*, No. 01-14-00746-CR, 2016 WL 4374959, at 1 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016) (mem.op., not designated for publication). Arthur Washington[17] was the trial counsel for Mr. Terrell in *Terrell v. State*. *Id.* At the motion for new trial, Mr. Terrell alleged that Mr. Washington never discussed with him the punishment range of 25 years to life in prison and, if he had, he would have taken the 7-year plea bargain offer. *Id.* at 2. Mr. Washington also testified at the motion for new trial but neither appellate counsel nor

[16] Appellate Counsel could not find any case applying the doctrine of chances to a claim of ineffective assistance of counsel. This doctrine has primarily been used as an evidentiary admissibility tool.

[17] There is only one person by the name of Arthur Washington that is part of the State Bar of Texas. https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=191132

the State asked him if he had advised Mr. Terrell that the range of punishment could be 25 years to life in prison if the enhancements were proven. *Id.* In its opinion, the Court noted that "Washington's testimony at the hearing on the motion for new trial – 18 months after the trial – reflected some confusion about the felony grade and punishment range at issue." Id. at 4. However, though there was confusion on trial counsel's part, the Court stated that the record from the pretrial motion in limine demonstrated Mr. Washington's understanding that Mr. Terrell faced 25 years to life in prison. *Id.*

As such, similar events are unlikely to be innocent. Just as Mr. Terrell alleged that he was improperly advised as to the range of punishment for his case, the record here for Appellant also shows Mr. Washington's "confusion about the felony grade and punishment range at issue." See *Id.* The record here does not show that Mr. Washington understood the range of punishment to be automatic prison time after the murder conviction. It shows the opposite. (1 C.R. at 627; 2 C.R. at 87; 8 R.R. at 14-15, 17-18).

Mr. Washington's misunderstanding of the law coupled with a documented prior instance of confusion as to range of punishment leads to the conclusion that Appellant suffered prejudice from those actions.

ISSUES THREE, FOUR, AND FIVE

Issues three, four, and five involve errors in the judgments and bill of costs. (1) The trial court improperly imposed duplicate court costs, (2) the trial court improperly imposed costs for services that were not performed, and (3) the court of appeals must remove all the trial court's assessed costs from the bill of costs.

Applicable Law to Modify Judgment and Bill of Costs

An appellate court has the power to correct and reform a trial court judgment "to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require." *Nolan v. State,* 39 S.W.3d 697, 698-99 (Tex. App. - Houston [1st Dist.] 2001, no pet.) citing *Asberry v. State,* 813 S.W.2d 526, 529 (Tex. App. - Dallas 1991, pet. ref'd); Tex. R. App. P. 43.2.

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").

Issue Three: *Appellant was improperly ordered to pay separate court costs for each conviction; a court may only assess these costs once because Appellant was tried in one criminal action.*

"In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant." TEX. CODE CRIM. PROC. art. 102.073(a); *Williams v. State*, 495 S.W.3d 583, 589 (Tex. App.—Houston [1st Dist.] 2016, pet. granted). Here, Appellant was tried in one criminal action. The State filed a motion to consolidate the trial on February 23, 2023, and that motion was granted by the Court on November 9, 2023. (1 C.R. at 56-58, 2 C.R. at 42-44). However, the trial court assessed court costs at $290 for each conviction. (1 C.R. at 678; 2 C.R. at 130). The *Bill of Costs* accompanying each of the judgments reflects the following amount of court costs: "$185" for "Consolidated Court Cost – State" and "$105" for "Consolidated Court Costs – Local." (1 C.R. at 681; 2 C.R. at 133). The trial court only had authority to assess court costs once against Appellant. This Court must strike the assessment of $290 from one of the judgments and bill of costs.

Issue Four: *The trial court improperly imposed $105 in costs for 21 un-executed subpoenas; a court may not impose a cost for a service that was not performed.*

The costs imposed in a bill of costs may be challenged 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, nor were they itemized in the judgment. (1 C.R. at 678; 2 C.R. at 130; 8 R.R. at 25-27). Instead, an itemized *Criminal Bill of Costs* for each conviction was issued by the District Clerk on July 25, 2024, and July 29, 2024. (1 C.R. at 681; 2 C.R. at 133)[18]. Accordingly, Appellant may challenge these costs on appeal. *London*, 490 S.W.3d at 507.

Texas law authorizes a court to assess a $5 reimbursement fee for summoning a witness. TEX. CODE CRIM. PROC. art. 102.011(a)(3). However, a cost may not be imposed for a service not performed. *Id.* art. 103.002.[19] Accordingly, 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

[18] The *Criminal Bill of Costs* show the documents were printed on "7/25/2024" and "7/29/2024".
[19] 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.

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. 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).

Here, the bill of costs on the murder conviction shows that the court assessed $835 for "LEA – Summon Witness". (1 C.R. at 681).[20] At $5 per subpoena, this amount equates to 167 subpoenas. Of those 167 subpoenas, 21 were "un-executed." (1 C.R. at 110, 130, 133, 136, 142, 170, 215, 250, 258, 259, 265, 277, 292, 295, 298, 357, 441-443, 468, 542). The total assessment – $835 – is $105 in excess because the Court improperly assessed a $5 witness-summoning fee for 21 subpoenas that were never served.[21]

The returns for the 21 "Un-Executed" subpoenas include the following descriptions for the "action taken to summon" the witness:

- Not Employee (x4):
    - Not Employee/Not HCSO Employee (1 CR. At 110, 357)

[20] On appeal, Appellant is only alleging improperly assessed costs on the un-executed subpoenas as it pertains to the criminal bill of costs on the murder conviction. The record on the deadly conduct conviction contained two subpoenas that were both executed. (2 C.R. at 41, 49).
[21] $5 X 21 = $105

    - Not Employee/Retired (1 C.R. at 215)
    - Not Employee/Montgomery County Sheriff's Office does not have an employee with the same name (1 C.R. at 142)
- Peace Officer (x13)
    - Personal service attempted. No one answered the door. Slipped subpoena through door or placed in secure location (1 C.R at 130, 133, 136, 258, 259, 292, 298, 468)
    - Personal service attempted. Witness does not live at this address. Per the leasing office the witness moved out. (1 C.R. at 170)
    - Personal service attempted. No answer – slid subpoena through the door. (1 C.R. at 295, 441, 442, 443)
- Email (x1)
    - Message delivered to a different person (1 C.R. at 250)
- U.S. Postal Service (x1)
    - Not deliverable as addressed (1 C.R. at 265)
- Fax (x1)
    - Invalid Fax (1 C.R. at 277)
- No Method Attempted (x1)
    - No method attempted/Not HCSO (1 C.R. at 542)

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 21 "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.* Because "nothing in the record" demonstrates that a peace officer served 21 of the 167 issued subpoenas, there is no basis for $105 of the $835 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 $105—from $835 to $730.

Issue Five: *The Court must remove the assessed costs from the bill of costs because the trial court ordered that the costs are not payable until Appellant is released from confinement.*

Art. 103.001 of the Texas Code of Criminal Procedure provides: "A cost is not payable by the person charged with the cost until a written bill is: (1) produced or ready to be produced, containing the items of cost; and (2) signed by the officer who charged the cost or the officer who is entitled to receive payment for the cost." TEX. CODE CRIM. PROC. art. 103.001(a) (1-2). The clerk's record in this case includes a bill of cost, for each conviction, that contains the items of cost and is signed by the district clerk, the officer who is entitled to receive payment for the cost pursuant to Art. 103.003 of Texas Code of Criminal Procedure. (1 C.R. at 681; 2 C.R. at 133). As such, the bill of cost meets the statutory requirements of a cost that is payable now.

However, each of the judgments on Appellant's cases orders for costs to be paid *after* Appellant has served his sentence:

> 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.

(1 C.R. at 679; 2 C.R. at 131)

Pursuant to both statute and case law, a trial court has the authority to order costs payable on a future date, including "upon release from confinement." TEX.

CODE CRIM. PROC. art. 42.15 (a-1), (b)(1); 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 82 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.). Additionally, at least one court of appeals has concluded that the trial court has satisfied article 42.15(a-1)(1), by ordering costs payable in the future, despite no on-the-record ability to pay inquiry. 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)).

Consequently, both bill of costs should not include any costs at all because the judgments order that the costs be paid upon release from confinement. The trial court's order satisfies article 42.15(a-1) and therefore this Court should modify the

bills of costs by removing all the costs since they conflict with the trial court's orders. 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).

CONCLUSION & PRAYER

James Sotelo asks this Court to grant his first issue and reverse his convictions because the trial court had no jurisdiction.

If his first issue is rejected, Mr. Sotelo asks that this Court grant his second issue and find that his trial counsel provided ineffective assistance of counsel. He requests this Court to reverse his convictions and remand these cases for a new trial.

In his third, fourth, and fifth issues, Mr. Sotelo asks that this Court reform the costs and fees assessed against him so that they are in accordance with the law.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

/s/ Fernanda Benavides
FERNANDA BENAVIDES
Assistant Public Defender
TX Bar No. 24120485
1310 Prairie, 4th Floor
Houston, Texas 77002
Ph. (713) 274-6700
Fax. (713) 368-9278
fernanda.benavides@pdo.hctx.net

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing brief was e-filed with the First Court of Appeals, was served electronically upon the Appellate Division of the Harris County District Attorney's Office, and was also sent on the same date by first-class mail to:

James Michael Sotelo
TDCJ # 02516794
Dolph Briscoe
1459 West Highway 85
Dilley, TX 78017

/s/ *Fernanda Benavides*
Fernanda Benavides

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

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Bar No. 24120485
Ashley.Davila@pdo.hctx.net
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jani Maselli		jani.maselli@pdo.hctx.net	11/25/2024 12:07:05 PM	SENT
Jessica Caird	24000608	caird_jessica@dao.hctx.net	11/25/2024 12:07:05 PM	SENT
Fernanda Benavides		fernanda.benavides@pdo.hctx.net	11/25/2024 12:07:05 PM	SENT