Nos. 14-24-00551-CR & 14-24-00552-CR

In the Fourteenth Court of Appeals
Houston, Texas

FITZGERALD CAMPBELL,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 209th Judicial District Court
Harris County, Texas
Brian Warren, Judge Presiding
In Cause Nos. 1774366 & 1774367

APPELLANT'S OPENING BRIEF

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To the Honorable Court of Appeals:

Appellant, Fitzgerald Campbell, respectfully submits this brief.

STATEMENT OF THE CASE

In two indictments, Campbell was charged with the murder of Steven Campbell ("Steven Sr.") and with aggravated assault against Steven Campbell Jr. ("Steven Jr.").[1] Tex. Penal Code §§ 19.02(b)(1), (b)(2), 22.02(a)(2).

Campbell pleaded not guilty, but a jury convicted him in both cases.[2] The trial court assessed punishment at 45 years' confinement for the murder and 20 years' confinement for the aggravated assault.[3] The court assessed court costs against Campbell in both judgments.[4] This appeal followed.

[1] Clerk's Record in cause no. 1774366 (CR366*) at 37; Clerk's Record in cause no. 1774367 (CR367) at 53; Reporter's Record volume (RR) 3:9–11.

* The Clerk's Records were originally filed on September 20, 2024. The Clerk's Record in cause no. 1774366 was defective. The Clerk filed a corrected copy on October 22. All citations to "CR366" are to the corrected record.

[2] CR366:411, 416; CR:367:98; 101; RR3:10–11, 18; RR6:44–45.

[3] CR366:416; CR367:101; RR7:70.

[4] CR366:416; CR367:101.

Issues Presented

1. **Ineffective Assistance of Counsel—Outbursts.** The complaining witness made three plainly objectionable outbursts during his testimony that were inflammatory and undercut Campbell's defense. Was trial counsel constitutionally ineffective when he did not object to the outbursts, did not request an instruction to disregard, and did not move for a mistrial?

2. **Ineffective Assistance of Counsel—False Testimony.** A police detective testified, falsely, that if anyone had reported Steven Sr. to be a gang member, then he would have been in the Houston Police Department's gang database. Was trial counsel constitutionally ineffective when he did not object to this material false testimony?

3. **Judgments—Offenses and Cost-and-Fee Assessments.** The judgments contain errors in their statements of the offenses, and in the assessments of costs and fees. Should this Court modify the judgments to correct each error?

4. **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

Fitzgerald Campbell had been afraid of his brother for a long time. When his nephew attacked him, he learned just how much the son followed in the steps of the father. Feeling threatened by both men, Campbell shot them.

Campbell's brother and nephew are drug dealers.

In June 2022, Fitzgerald Campbell was 55 years old, disabled, and living with his mother, Betty Campbell, at 862 Marcolin Street in Houston.[5] His uncle, Clyde, and his brother, Steven Sr., lived there, too.[6] Decades ago, Campbell had worked as a PC board operator for several technology companies, but by 2022 he was unemployed.[7]

Back when Campbell was employed, Steven Sr., "was always in jail."[8] According to Campbell, Steven Sr. was a gang member—a Blood, like the rest of the neighborhood.[9] He dealt drugs, which was

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[5] RR5:94, 96–97.

[6] RR5:97.

[7] RR5:95–96.

[8] RR5:98, 123.

[9] RR5:152–53. The State, without objection from the defense, called Detective Hale to testify in rebuttal that Steven Sr. was not "documented" as a gang member in the Houston Police Department gang database. RR6:12–13. The detective also testified, without objection, that Steven Sr.'s gang affiliation would have "gone into the system" if someone had called the police and reported it. RR6:15. This testimony was patently, demonstrably false. By law, a person cannot be documented as a gang member based solely on a report to police. *See* Tex. Code Crim. Proc. art. 67.054(b)(2)(C) (requiring two criteria before a person may be documented as a gang member).

why he had gone to jail.[10] Campbell knew he was "dangerous."[11] He had attacked Campbell before.[12] He had also "beat[] up his wives" before, but he had never been convicted of a crime for that.[13] To Campbell, Steven Sr. was "a monster."[14] Nevertheless, Campbell would send Steven Sr. money in jail—he was the only family member who did so.[15]

Steven Sr. continued to deal drugs.[16] His son, Steven Jr., was at the house "every day" helping him to deal drugs.[17] Steven Jr. had played college football at Texas A&M and then moved to the Beaumont area.[18] But he came through town for work.[19]

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[10] RR5:123.

[11] RR5:108.

[12] RR5:112.

[13] RR5:124.

[14] RR5:115.

[15] RR5:98.

[16] RR5:150.

[17] RR5:99, 150.

[18] RR4:74, 79–80. Steven Jr. claimed to have played as a starter for four years at A&M and then "Professionally, for a short period of time." *Id.* Campbell, by contrast, testified that Steven Jr. "dropped out." RR5:104. A two-second Google search reveals who lied about this and who told the truth, but that information is not in the record, and Campbell therefore cannot and does not rely upon it in this brief. *See Johnson v. State*, 624 S.W.3d 579, 585 (Tex. Crim. App. 2021) ("An appellate court cannot consider an item that is not a part of the record on appeal.").

[19] RR4:76.

Campbell snitches on Steven Sr., who finds out and retaliates. Some time before the incident in this case, someone "got killed," and Campbell called the police to "snitch" on his brother.[20] He spoke to a "Detective Collins."[21] A man named Willie Green told Steven Sr. that Campbell had snitched.[22] Steven Sr. accused Campbell of being a snitch and "ran [him] down."[23] Green shot at Campbell's car.[24] Campbell "went to the police" again, but the police "didn't believe" him.[25]

Later, Campbell saw Green at a gas station and "wanted to know why they shot at my car."[26] He took a gun with him.[27] Campbell hit Green in the face.[28] The two men fought, and the gun went off.[29] A bullet grazed Green's cheek.[30]

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[20] RR5:149–50.

[21] RR5:149.

[22] RR5:150–51.

[23] RR5:149–50.

[24] RR5:150.

[25] RR5:149.

[26] RR5:150–51, 152.

[27] RR5:130.

[28] RR5:126.

[29] RR5:130.

[30] RR5:127, 130.

The day of the incident starts off calmly.

On June 10, 2022, Campbell went to a doctor's appointment for himself in the morning; he returned home between 10:00 and 10:30 a.m. and took his uncle to a doctor's appointment, where he stayed from 11:30 until around 2:45 in the afternoon.[31] Afterwards, Campbell and his uncle picked up some chicken wings, beer, and ice and came back home.[32] Campbell and his uncle ate, and then Campbell went to sleep.[33] It was around 4 or 4:30 in the afternoon.[34]

Steven Jr. attacks Campbell.

Hours later, Campbell was suddenly awakened by Steven Jr. "arguing [and] talking about, [']Who in the hell got this water and links[']?]"[35] Campbell responded that he didn't know what Steven Jr. was talking about.[36] Steven Jr. started calling Campbell "a faggot ass snitch," and Campbell replied that Steven Jr. was a "400,000-dollar dropout."[37]

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[31] RR5:100.

[32] RR5:101–02.

[33] RR5:102.

[34] RR5:102–03.

[35] RR5:103–04.

[36] RR5:104.

[37] RR5:104.

Steven Jr., threw Campbell to the ground and started jumping and stomping on him.[38] Steven Sr. and Betty came into the room, yelling for Steven Jr. to stop.[39] Campbell was "balled up," while Steven Jr. continued stomping and kicking him for ten minutes.[40]

Campbell arms himself and shoots both men as they are coming at him.

Campbell was finally able to go outside and get his gun.[41] He decided to go to his aunt's house to talk to her.[42] But then Steven Sr., who had come outside carrying a gun, came "rushing up at" Campbell "in a threatening way," "talking about fighting" and "wanting to fight."[43]

Campbell, fearing for his life and knowing that Steven Sr. was dangerous, shot him.[44] Campbell remembered shooting just "one time," and that the gun "shot twice" when he pulled the trigger.[45]

After shooting Steven Sr., Campbell went back in the house, got his father's shotgun, and came back outside.[46] He didn't run away

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[38] RR5:105, 131.

[39] RR5:106, 132.

[40] RR5:106.

[41] RR5:107.

[42] RR5:107.

[43] RR5:107–08, 132–33, 154.

[44] RR5:108, 115.

[45] RR5:109, 111–12, 133.

[46] RR5:109, 120.

because Steven Sr. and Steven Jr. "were still there."[47] "It was too late" to run because Campbell had already shot Steven Sr.[48] Steven Sr. was leaning against the car but still had his gun, so Campbell shot him with the shotgun, hitting him "by the head."[49]

Then Steven Jr. "was coming towards" Campbell, and Campbell shot at him, too.[50] Campbell could tell from the "way" Steven Jr. was "coming towards" him that his life was in danger.[51] Steven Jr. had never treated Campbell "like this" before that day, but after Steven Jr. jumped on him in the house, Campbell was in fear.[52]

Campbell told Steven Jr. to move back, but "he ke[pt] on coming and he kept on going," so Campbell followed him "around the corner" to make sure he wouldn't come back to the house.[53] Campbell was afraid that if Steven Jr. came back to the house, he would "get the gun."[54]

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[47] RR5:109, 121.

[48] RR5:110, 113.

[49] RR5:119, 121, 133–35, 136.

[50] RR5:110, 140.

[51] RR5:112.

[52] RR5:113, 116.

[53] RR5:110.

[54] RR5:110.

Campbell "regret[ted] what happened," but he was in "fear of [his] life" when he shot the two men.[55] After the shooting, Campbell was upset, and in anger he busted the windows out of Steven Jr.'s car, which caused the shotgun to come apart.[56] Campbell threw the gun into the car and then sat down in his neighbor's yard across the street.[57]

The police are called.

Warneisha Horn and Miracle Jones, two sisters who lived across the street, were inside their house when Warneisha heard "two gunshots" and Miracle heard only one.[58] They went outside, and Miracle saw Campbell shooting at Steven Jr.'s car with a shotgun, while Warneisha saw Steven Jr. walking towards them holding his side with blood on it.[59] Then Warneisha saw Campbell "chasing him … with a big gun."[60]

As the two men "made the block and then … came back around," the girls ran back inside the house and called 911.[61] The 911

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[55] RR5:111.

[56] RR5:113–14.

[57] RR5:113.

[58] RR4:8–10, 11, 46, 61–62.

[59] RR4:12, 24; 46.

[60] RR4:12.

[61] RR4:13, 15, 47–48; SE 72.

recording noted that the call was placed at 8:01 in the evening.[62] Warneisha told the 911 operator that Steven Sr. had "just got shot."[63] Then she said that Campbell "shot somebody else."[64] After giving a description of what Campbell was wearing, she said that he was "standing by the car" and breaking the glass, saying "I killed that bitch. That bitch is dead" over and over.[65] She then said that she saw "three other men" walking toward Campbell, and that one of those men had a gun.[66] She saw those men walk into Campbell's house.[67]

At trial, Warneisha testified that she saw Campbell shoot Steven Sr. twice with a pistol.[68] She never saw Campbell fire the shotgun; she only saw him "beat the car and chase [Steven Jr.] with it."[69] Miracle, meanwhile, testified that the "somebody else" that Campbell shot after shooting Steven Sr. was Steven Sr., and that Campbell shot him with a handgun.[70] She said that Campbell shot Steven Sr. with

[62] RR4:48; SE 72 at 00:01.

[63] RR4:49–50; SE 72 at 01:07.

[64] RR4:15, 50; SE 72 at 01:30.

[65] RR4:16–17, 52–53, 56; SE 72 at 02:35.

[66] RR4:53; SE 72 at 02:59.

[67] SE 72 at 03:13.

[68] RR4:16, 32–33.

[69] RR4:33.

[70] RR4:51.

the pistol "while he was on the concrete" and that "there was already blood" coming from his stomach and head.[71]

Campbell stays at the scene until the police arrive.

When the police arrived, Campbell told them that "I did it," that he was "the one you're looking for," and he told them where the guns were in the cars.[72] He also yelled that "Y'all couldn't do shit when I came and told you"—meaning, when Campbell tried to report Steven Sr. previously.[73] After he was handcuffed, he told one of the officers, "Y'all didn't do shit, then I did something."[74]

Police found a disassembled shotgun in Steven Jr.'s car.[75] About an hour after the shooting, Campbell's mother, Betty, and relative, Jermaine Phillips, showed police a handgun in the house, which the police recovered.[76] The gun was in the den, which was where Campbell slept.[77]

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[71] RR4:71. After Miracle described it this way—Steven Sr. already having a head wound—which lined up with the medical examiner's findings that Steven Sr. had been shot in the head with a shotgun rather than a pistol, the prosecutor prompted her to change her testimony and say that she saw Campbell shoot Steven Sr. in the head with the pistol. RR4:71–72.

[72] RR3:27–28, 33–34; RR5:113–14.

[73] RR5:146, 149; SE 1 at 06:18.

[74] SE 1 at 07:03.

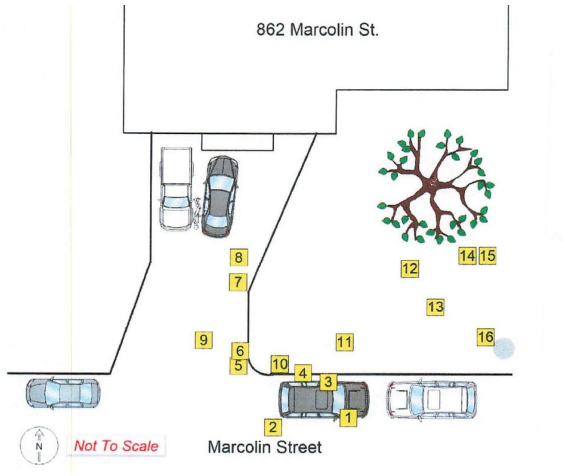
[75] RR3:31; SE 75.

[76] RR3:39–42, 51–53; SE 3–5, 6–7.

[77] RR3:54.

Crime scene investigators recover evidence.

Crime scene investigators located bullet defects, cartridge cases, shotgun shells, and unfired bullets and shells, and they sketched out the scene.[79] They found metal fragments by and in Steven Jr.'s car.[80] They photographed Steven Sr., who was lying facedown in the driveway between two vehicles; after he was placed in a body bag, they found a projectile in the bag.[81] They found no other firearms besides the two recovered by the police officers.[82]



Detail from State's Exhibit 8,[78] showing evidence markers. No. 1 is a piece of the shotgun; 2 and 16 are fired shotgun shells; 3 is a metal fragment, 4–8, 10, and 11 are cartridge cases, 9 is an unfired cartridge, and 12–15 are unfired shotgun shells.

[78] The crime-scene diagram is inaccurate, even considering its "Not To Scale" disclaimer. Photos of the scene show that the diagram misrepresents the shape and layout of the driveway and, as a result, depicts the fired cartridge cases as more scattered than they really were. *See* SE 10, 11, 29, 33, 36. This matters because, during trial, the prosecutor used the inaccurate diagram to point out that the evidence markers were "not concentrated" and therefore the shooter had "been moving around." RR3:106.

[79] RR3:62, 68–69, 71–77, 78–81; SE 8, 19–47.

[80] RR3:77, 91; SE 26.

[81] RR3:83; SE 58.

[82] RR3:84.

Analysis of the fired cartridge cases showed that they were the same caliber as the recovered handgun.[83] Two fired bullets that had been recovered also matched the caliber of the handgun.[84] The cartridge cases, the two bullets, and another bullet fragment were identified as having been fired by the gun.[85]

Police located a surveillance camera down the street that had recorded Steven Jr. running by, with Campbell following at a walk about 30 seconds later; he was carrying the shotgun and appeared to reload it.[86] The time stamp on the video shows that this occurred about 5 minutes before Warneisha Horn's 911 call.[87]

The investigation reveals Steven Jr.'s injuries and the cause of Steven Sr.'s death.

Steven Jr. was treated and taken to the hospital by EMS, who noted that he had suffered a gunshot wound in his left buttock.[88] EMS also noted that Steven Sr. was dead, had been shot in the head, that there was a large amount of blood coming from his head, and that the "obvious sign of death was head trauma caused by gun wounds."[89]

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[83] RR3:135–37; SE 67.

[84] RR3:127, 130; SE 67.

[85] RR3:136–38, 148–49; SE 67.

[86] RR4:115, 118; SE 73 at 00:29.

[87] RR4:119.

[88] RR4:90; SE 74.

[89] RR5:14; SE 76.

An autopsy confirmed that determination.[90] Steven Sr. had six gunshot wounds.[91] The first was a gunshot wound to the head and neck.[92] That wound contained pellets, a piece of casing, and a wad from a shotgun shell.[93] There was a gunshot wound on Steven Sr.'s right torso; a bullet had entered his right side and exited from his right chest.[94] Another bullet had gone through Steven Sr.'s penis and into his left thigh, where it fractured his femur and lodged in soft tissue.[95] A third bullet struck Steven Sr.'s left arm.[96] A fourth struck his left leg.[97] And one more struck the back of his right thigh.[98]

While all six gunshot wounds "contributed to his death," "the most important one and the most critical one that injured him and caused his death at the time that it did was the gunshot wound to the head."[99]

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[90] RR5:87; SE 77.

[91] RR5:62; SE 77. The prosecutor called them "six *bullet* injuries," but the fatal head wound came from a shotgun. RR5:60, 67–68, 81.

[92] RR5:60.

[93] RR5:67–68, 81; SE 77, 101.

[94] RR5:69–71; SE77, 85–87.

[95] RR5:71–75, 80–81; SE 77; 92–93, 102.

[96] RR5:76; SE 77, 94–95.

[97] RR5:76; SE 77, 96–97.

[98] RR5:77; SE 77, 98–99.

[99] RR5:87.

Steven Jr. tells a different story.

Steven Jr. told the jury that a "little misunderstanding" led to the shooting.[100] According to him, Campbell, Steven Sr., and Betty were in the kitchen "around noon," when Steven Jr. came back from the store.[101] He said that Betty asked him "if some links in the pot were mine," and that he, assuming they were Campbell's, told her to ask him instead.[102]

Steven Jr. claimed that Campbell "immediately told her that he was just tired and started to raise his voice."[103] He said that he went into the back room and tried to wake up his father (whom he had just said was already in the kitchen).[104] Eventually, he said, his father woke up and said that the links were Campbell's, but Campbell wouldn't calm down and "it escalated from there."[105] He said that Campbell tried to "rush" him in the kitchen, after which he and Steven Sr. left.[106]

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[100] RR4:77.

[101] RR4:76, 78.

[102] RR4:78, 98.

[103] RR4:78.

[104] RR4:78.

[105] RR4:78–79.

[106] RR4:79, 95.

A few hours later, between 4:00 and 5:00 p.m., they came back, and Campbell "kept picking at it."[107] Steven Jr. said he decided to leave and went out to his car and talked to a neighbor while Steven Sr. went to get a haircut.[108]

"Later in the evening," Steven Jr. was still in his car when he realized he was "getting shot at" and was hit in the "lower buttocks area."[109] He said that "the gun jammed" after "four or five shots," and then he saw Campbell "run to his car."[110] Just then, he said, Steven Sr. pulled into the driveway and got out of his car, at which point Campbell reached in his car, got a shotgun, and shot Steven Sr. twice.[111] Then he continued shooting Steven Jr. "multiple times" with the shotgun.[112]

Steven Jr. said that he ran down the street, trying not to get shot any more.[113] He said that Campbell "went to his car and got more bullets and kept coming" after him., chasing him down two streets.[114]

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[107] RR4:79.

[108] RR4:79–80.

[109] RR4:81, 88.

[110] RR4:81, 83.

[111] RR4:81–82, 83, 84.

[112] RR4:82, 84.

[113] RR4:85–86.

[114] RR4:86.

Eventually, Steven Jr. said he got into a friend's car and went to his grandfather's house, where he learned that Steven Sr. was dead.[115]

Steven Jr. claimed that neither he nor Steven Sr. had a weapon when the shooting happened, and that neither of them had any weapons in the house, either.[116]

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[115] RR4:86–87.

[116] RR4:105.

Summary of the Argument

Issue One

Trial counsel was constitutionally ineffective when he failed to object to Steven Jr.'s repeated outbursts during trial. The outbursts were improper, and there is no conceivable strategic reason for a competent attorney not to have objected to them. Counsel's failure to object, request an instruction to disregard, and move for a mistrial both left the outbursts unaddressed before the jury and left Campbell without an appellate remedy. Had counsel objected, he would have been entitled to a mistrial, or Steven Jr. would have been entitled to appellate reversal for the court's failure to grant a mistrial.

Issue Two

Trial counsel was also constitutionally ineffective when he failed to object to Detective Hale's false testimony during rebuttal. The testimony was patently false *by law*. Yet it undercut Campbell's credibility on the only thing that mattered at trial—his claim of self-defense. There is no conceivable strategic reason for a competent attorney not to have objected to the testimony and preserved a false-evidence claim for appellate review.

Issue Three

The judgments in both cases contain errors that this Court should correct:

- The aggravated-assault judgment states the wrong offense, and neither judgment reflects the statute for each offense.
- The aggravated-assault judgment assesses $290 in duplicative court costs and $15 in duplicative reimbursement fees that, by law, may be assessed only once per trial.
- Both judgments include a $5 reimbursement fee for "release," even though the record does not show that a peace officer ever released Campbell.
- The murder judgment assesses $275 in reimbursement fees for summoning witnesses, but the record contains only four subpoenas that summoned a witness and were validly served by a peace officer. At $5 per subpoena, the court should have assessed only $20 for summoning witnesses.
- Finally, the aggravated-assault judgment assesses $20 in reimbursement fees for summoning witnesses, but none of the subpoenas in the record properly summoned a witness.

Issue Four

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

Issues One and Two
(Ineffective Assistance of Counsel)

During trial, Campbell's counsel sat silent as the State presented inadmissible, inflammatory, and false evidence against him. Counsel's failure to object each time was so outrageous that his ineffectiveness is apparent from the record, as is the prejudice to Campbell.

Standard of Review for Direct-Appeal Claims of Ineffective Assistance of Counsel

A defendant is entitled to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). While a defendant is not entitled to errorless counsel, he is entitled to objectively reasonable representation. *Lopez*, 343 S.W.3d at 142.

To obtain a reversal of a conviction due to ineffective assistance of counsel, an appellant must demonstrate, by a preponderance of the evidence, both:

1) Deficient performance—that counsel's performance fell below an objective standard of reasonableness; and

2) Prejudice—that but for the deficiency, there is a reasonable probability that the result of the proceeding would have been different.

Id.

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and was motivated by legitimate trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). For a court to find counsel ineffective, counsel's deficiency must be affirmatively demonstrated in the record; the court must not engage in retrospective speculation. *Id.* When direct evidence is not available, the court will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined. *Id.* In most cases on direct appeal, the record will be too undeveloped for the court to review trial counsel's motives. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

Nevertheless, some claims of ineffective assistance of counsel may be "so apparent from the record" that they can be addressed on direct appeal. *Freeman v. State*, 125 S.W.3d 505, 507 (Tex. Crim. App. 2003) (quoting *Massaro v. United States*, 538 U.S. 500, 508 (2003)). A reviewing court may find counsel's performance to be deficient when counsel's conduct was so outrageous that no competent attorney would have engaged in it. *Nava v. State*, 415

S.W.3d 289, 308 (Tex. Crim. App. 2013). This usually occurs when "there is no imaginable strategic motivation for trial counsel's failure" to act. *Villa v. State*, 417 S.W.3d 455, 463 (Tex. Crim. App. 2013) (citing *Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992)).

1. Issue One: Trial counsel was constitutionally ineffective for not objecting to Steven Jr.'s repeated outbursts.

During his testimony, Steven Jr. repeatedly made comments directed toward Campbell that were nonresponsive, improper, inadmissible, and inflammatory. Yet Campbell's attorney did nothing—he did not object, he did not ask for an instruction to disregard, and he did not move for a mistrial. This was objectively deficient performance that affected the outcome of the trial.

1.1. Steven Jr. made three plainly objectionable comments, and counsel didn't object to any of them.

The first comment came when the State asked Steven Jr. to describe his own actions when Campbell shot at him with the shotgun. Steven Jr. answered the question, but then kept going and started talking directly to Campbell:

> STATE: When he started shooting at you with the shotgun, what did you do?
>
> STEVEN JR: I just started doing whatever I could do, like, that made sense at the time. Just,

like trying to not run in a straight line, not get shot; but at the same time, not putting nobody else life in danger by, like, running in nobody else's yard or anything because I didn't know what was on his mind because he was just coming out of nowhere shooting at me and *shot your baby brother for no reason*.[117]

Campbell's attorney did not object to this.[118]

The next comment came when the State asked Steven Jr. how he was feeling after he got medical treatment. Steven Jr. answered the question, but then he delivered a soliloquy directly to Campbell:

STATE: … So, Steven, after you get treated, how are you feeling, after you just processed that day?

STEVEN JR: Still in shock. Like, traumatized that this could happen or it happened like that. Still lost and confused because I still don't know the reason why or understand why.

You shot me and you killed your baby brother. Always wanted to or whatever was going on, I just don't understand it. That's something I would like to know: Why you shot me; why you shot your baby brother.

[117] RR4:85 (emphasis added).

[118] RR4:85–86.

When I clearly told you I didn't want to fight or argue with you.[119]

Again, there was no objection; Campbell's attorney was silent.[120]

The third comment came when the State showed Steven Jr. photographs of Steven Sr. and asked him to point out some injuries in the photos. Steven Jr. answered the question, but then offered an unprompted, unqualified opinion of Campbell's mental state:

STATE: So we see, Steven, multiple abrasions on your father's face?

STEVEN JR: Yes.

STATE: And a gunshot wound on his chest?

STEVEN JR: That's how it happened. Yes, sir. Close range. *Intentionally done.*[121]

For a third time, Campbell's counsel said nothing.[122]

1.2. Counsel's failure to object was deficient.

Despite crickets from counsel, each of these outbursts was plainly objectionable. Witness outbursts are improper. *Coble v. State*, 330 S.W.3d 253, 291–92 (Tex. Crim. App. 2010). Some witness outbursts

[119] RR4:91–92 (emphasis added).

[120] RR4:92.

[121] RR4:93 (emphasis added).

[122] RR4:93–94.

may be cured by an instruction to disregard, while others may be so inflammatory as to require a mistrial. *Id.*

Yet counsel sought neither. Not only did counsel fail to object, but he also failed to ask for an instruction to disregard, and he failed to move for a mistrial.

There is no conceivable strategic reason for that. By not objecting and asking for an instruction to disregard, counsel left the outbursts completely unaddressed for the jury's full consideration. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (when reviewing sufficiency of the evidence to support the jury's finding of guilt, reviewing court will consider even evidence that was "improperly admitted"); *Waldo v. State*, 746 S.W.2d 750, 753 (Tex. Crim. App. 1988) (jury will be presumed to follow an instruction to disregard evidence, if given).

And by not objecting, asking for an instruction to disregard, or moving for a mistrial, counsel failed to preserve any issue related to the improper testimony for appeal. *See Nethery v. State*, 692 S.W.2d 686, 701 (Tex. Crim. App. 1985) (counsel must pursue objection to adverse ruling to preserve issue for review).

Counsel therefore left his client in the worst possible scenario: three improper outbursts were before the jury, the jury could consider them, and there would be no appellate remedy. This was outrageously deficient. No competent attorney would have failed

either to object to Steven Jr.'s outbursts or to preserve the issue for appeal.

1.3. Counsel's failure to object prejudiced Campbell.

Counsel's deficient performance prejudiced Campbell because there is a reasonable probability that but for the deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686; *Lopez*, 343 S.W.3d at 142. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

Here, counsel's outrageously deficient performance undermines confidence in the outcome of the trial because if counsel had objected to the outbursts, asked for an instruction to disregard, and then moved for a mistrial, he would have been entitled to one.

When determining whether an outburst is sufficient to warrant a mistrial, the Texas Court of Criminal Appeals has considered several factors to determine whether there was a reasonable probability that the outburst interfered with the jury's verdict, including:

1) Whether the outburst was made by a bystander or a witness, *Stahl v. State*, 749 S.W.2d 826, 829 n.2 (Tex. Crim. App. 1988);
2) Whether it was verbal or non-verbal, *Landry v. State*, 706 S.W.2d 105, 112 (Tex. Crim. App. 1985);
3) Whether a verbal outburst contradicts the evidence or a legal defense or affects the credibility of

testimony, *Ashley v. State*, 362 S.W.2d 847, 851 (Tex. Crim. App. 1962);

4) The timing of the outburst, *Coble*, 330 S.W.3d at 292;
5) The inflammatory effect of the outburst weighed against the strength of the evidence, *Stahl*, 749 S.W.2d at 832; and
6) How the trial court responded to the outburst, *Landry*, 706 S.W.2d at 111–12; *Ashley*, 362 S.W.2d at 850.

Each factor demonstrates that Steven Jr.'s outburst sufficiently interfered with the jury's verdict to have warranted a mistrial had counsel moved for one:

1. Steven Jr. was a **witness** rather than a bystander. And not just any witness, but the "complaining witness"—the alleged victim. "The added visibility of a witness over a mere bystander will increase the impact of an outburst on a jury." *Stahl*, 749 S.W.2d at 829 n.2.

2. All three of Steven Jr.'s outbursts were **verbal** outcries, two of which were directed toward Campbell as he sat, helpless, at the defense table next to silent counsel while the jury looked on. And all three outbursts communicated information to the jury in their presence. *See Landry*, 706 S.W.2d at 112 (finding no interference with jury's verdict when outbursts were non-verbal, and confrontation with the appellant was not in the jury's presence).

3. Steven Jr.'s outbursts **directly contradicted** Campbell's later testimony, and they expressed improper opinions about Campbell's

defensive issues and the strength of the State's case. *See Ashley*, 362 S.W.2d at 851. Steven Jr. first said to Campbell that he "shot your baby brother for no reason."[123] This directly contradicted the only defensive theory raised at trial, which was self-defense.

Steven Jr. next pummeled Campbell with an emotional declaration: "Always wanted to or whatever was going on, I just don't understand it. That's something I would like to know: Why you shot me; why you shot your baby brother. When I clearly told you I didn't want to fight or argue with you."[124] This not only contradicted the only defensive theory at trial, but it also improperly ascribed a motive to Campbell by asserting, without any support, that he "always wanted to" shoot them.

And the final outburst declared that Campbell shot Steven Sr. "Intentionally."[125] Steven Jr. was not competent to know Campbell's mental state; in fact, it is wholly improper for any witness to testify about a defendant's mental state or state of mind at the time of an offense. *See Avila v. State*, 954 S.W.2d 830, 841 (Tex. App.—El Paso 1997, pet. ref'd) (citing *Arnold v. State*, 853 S.W.2d 543, 546–47 (Tex. Crim. App. 1993); *Whitmire v. State*, 789 S.W.2d 366, 372 (Tex. App.—Beaumont 1990, pet. ref'd); *Williams v. State*, 649

[123] RR4:85.

[124] RR4:92.

[125] RR4:93.

S.W.2d 693, 696 (Tex. App.—Amarillo 1983, no pet); *Winegarner v. State*, 505 S.W.2d 303, 305 (Tex. Crim. App. 1974)).

4. Steven Jr.'s outbursts were well-**timed** to affect the jury. They came on the second day of trial, during the State's case in chief, before Campbell had to decide whether to testify and raise an issue of self-defense. *See Coble*, 330 S.W.3d at 292.

5. All three outbursts were **inflammatory** relative to the nature of the evidence. None of the outbursts was responsive to the question asked. None of the outbursts was remotely relevant to anything that had happened in the trial up to that point. And the prosecutor made no effort to mitigate the inflammatory nature of the outbursts. *See Stahl*, 749 S.W.2d at 832 (potential of outburst to inflame the jury is great when outburst adds nothing of value to the trial).

6. Finally, **the trial court made no response** to the outbursts. Whether requested or not, the court did not send the jury out, did not instruct the jury to disregard, and did not consider a mistrial. *See Landry*, 706 S.W.2d at 111–12 (trial court admonished family members and ordered them to avoid future outbursts); *Ashley*, 362 S.W.2d at 850 (trial court, without request, immediately instructed the jury to disregard the outburst).

In light of these factors, had counsel objected to the outbursts, he would have been either 1) entitled to a mistrial, or 2) entitled to reversal on appeal for denial of a mistrial. *Coble,* 330 S.W.3d at 292.

Thus, there is a reasonable probability that but for counsel's inexplicable failure to object, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686; *Lopez*, 343 S.W.3d at 142.

2. Issue Two: Trial counsel was constitutionally ineffective for failing to object to false testimony during the State's rebuttal.

Campbell's trial counsel was also ineffective for failing to object to material false testimony during the State's rebuttal case.

2.1. Detective Hale lied to the jury about the gang database, and counsel didn't object.

After Campbell testified that Steven Sr. was a gang member, the State re-called Detective Kristen Hale as a rebuttal witness.[126] She testified that Steven Sr. was not in the Houston Police Department's "gang tracker system" as a "documented gang member."[127] She affirmed that "if someone were to say that [Steven Sr. was a] gang member[], they would be lying."[128]

During this testimony, Detective Hale told the jury that if a person has "been documented by any other officers, it would be in the system."[129] She also affirmed to the jury that if "a person were to

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[126] RR6:12.

[127] RR6:12–13.

[128] RR6:13.

[129] RR4:12–13.

call HPD and snitch that he knows there's documented gang activity in his neighborhood or his family members," then that "would … have gone into the system."[130]

Both of those statements were false: A person cannot be documented as a gang member merely because a peace officer says so, nor can he be documented as a gang member merely because someone snitches on him. Instead, for a person to be documented as a gang member in a gang database, specific submission criteria must be met. *See* Tex. Code Crim. Proc. art. 67.054 (titled, "Submission Criteria"); *Zuniga v. State*, 551 S.W.3d 729, 738 & n.7 (Tex. Crim. App. 2018) (referring to the statutory requirements as "submission criteria"); *see also In re State*, 659 S.W.3d 1, 10 (Tex. App.—El Paso 2020, no pet.) (same).

Only two statutory criteria are independently sufficient to document a person as a gang member:

> 1) a judgment under any law that includes, as a finding or as an element of a criminal offense, participation in a criminal street gang; or
> 2) a self-admission by an individual of criminal street gang membership that is made during a judicial proceeding.

Tex. Code Crim. Proc. art. 67.054(b)(2).

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[130] RR6:15.

Neither the say-so of a police officer nor the report of a snitch constitutes either a judgment under law or a self-admission during a judicial proceeding. Accordingly, neither is sufficient, by itself, to document a person as a gang member.

If neither independent criterion is met, a person cannot be documented as a gang member unless "any two of the following" criteria exist:

> 1) a self-admission by the individual of criminal street gang membership that is not made during a judicial proceeding, including the use of the Internet or other electronic format or medium to post photographs or other documentation identifying the individual as a member of a criminal street gang;
> 2) an identification of the individual as a criminal street gang member by a reliable informant or other individual;
> 3) a corroborated identification of the individual as a criminal street gang member by an informant or other individual of unknown reliability;
> 4) evidence that the individual frequents a documented area of a criminal street gang and associates with known criminal street gang members;
> 5) evidence that the individual uses, in more than an incidental manner, criminal street gang dress, hand signals, tattoos, or symbols, including expressions of letters, numbers, words, or marks, regardless of how or the means by which the symbols are displayed, that are associated with a criminal street gang that operates in an area frequented by the individual and described [in the previous criterion];

6) evidence that the individual has been arrested or taken into custody with known criminal street gang members for an offense or conduct consistent with criminal street gang activity;
7) evidence that the individual has visited a known criminal street gang member, other than a family member of the individual, while the gang member is confined in or committed to a penal institution; or
8) evidence of the individual's use of technology, including the Internet, to recruit new criminal street gang members.

Tex. Code Crim. Proc. art. 67.054(b)(2)(C). The say-so of a police officer is wholly absent from this list, and the report of a snitch must be "corroborated" before it can constitute one of these criteria. *See id.* art. 67.054(b)(2)(C)(iii).

Therefore, when Detective Hale told the jury that "any other officers" or a "snitch" could get Steven Sr. documented as a gang member, she lied. Yet counsel did not object to Detective Hale's false testimony.[131]

2.2. Counsel's failure to object was deficient.

Instead of objecting, counsel merely cross-examined Detective Hale on whether a person's documentation in the database was conclusive as to whether the person is, in fact, a gang member.[132] At no point did he point out to the jury or the court that her testimony about

[131] RR6:12–16.

[132] RR6:14.

how a person is documented in the database in the first place was wholly false.

There is no conceivable strategic reason for counsel's failure to call out this false testimony. The gang-database statute has been on the books since 1995, and submission criteria have been a part of the law since 1999.[133] The database, with its submission criteria, has been mandatory for large counties and cities since 2009.[134] The law was recodified in 2017, but the recodification didn't change the two-criteria requirements that have been law for over two decades.[135] Any reasonably competent attorney would have known that Detective Hale's testimony was false.

Moreover, any reasonably competent attorney would have objected to the false testimony. It is well-settled that the State's use

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[133] For the original law, *see* Act of May 29, 1995, 74th Leg., R.S., ch. 671, § 1, art. 61.02, 1995 Tex. Gen Laws 3643, 3643 (amended 1999, 2007, 2009, repealed and replaced, 2017). For the addition of submission criteria, *see* Act of May 30, 1999, 76th Leg., R.S., ch. 1154, § 2, art. 61.02(c)(2), 1999 Tex. Gen. Laws 4057, 4057 (amended 2007, 2009, repealed and replaced, 2017). The independent judgment-under-law and judicial-proceeding-self-admission criteria were added in 2007. *See* Act of May 28, 2007, 80th Leg., R.S., ch. 258, § 18.05, art. 61.02(c)(2), 2007 Tex. Gen. Laws 367, 395 (amended 2009, repealed and replaced, 2017). Additional criteria in the "any two" list were added in 2009. *See* Act of May 31, 2009, 81st Leg., R.S., ch. 1130, § 36, art. 61.02(c)(c)(C), 2009 Tex. Gen. Laws 3119, 3129 (repealed and replaced, 2017).

[134] *See* Act of May 27, 2009, 81st Leg., R.S., ch. 736, § 1, art. 61.02(a)–(b), 2009 Tex. Gen. Laws 1866, 1866 (repealed and replaced, 2017).

[135] *See* Act of May 24, 2017, 85th Leg., R.S., ch. 1058, §§ 1.04, 5.01, 2017 Tex. Gen. Laws 4129, 4175–76, 4192 (amended 2023).

of material false testimony to obtain a conviction violates due process. *Ex parte Chavez*, 371 S.W.3d 200, 207–08 (Tex. Crim. App. 2012); *Ex parte Robbins*, 360 S.W.3d 446, 460 (Tex. Crim. App. 2011). But it is also well-settled that a defendant must object to the State's use of false testimony to preserve the issue for appellate review. *See*, *e.g.*, *Shaw v. State*, No. 04-17-00535-CR, 2018 WL 2418439, at *1 (Tex. App.—San Antonio May 30, 2018, pet. ref'd) (mem. op., not designated for publication) (citing *Castillo v. State*, No. 04-11-00422-CR, 2013 WL 781776, at *13 (Tex. App.—San Antonio Mar. 1, 2013, pet. ref'd) (mem. op., not designated for publication); *Davis v. State*, 276 S.W.3d 491, 499–500 (Tex. App.—Waco 2008, pet. ref'd); *Halliburton v. State*, 80 S.W.3d 309, 315 (Tex. App.—Fort Worth 2002, no pet.)).

2.3. Counsel's failure to object prejudiced Campbell.

By failing to object to Detective Hale's false testimony, counsel not only left the testimony unanswered before the jury, he also did not preserve a *constitutional due-process* false-evidence claim for appeal. This prejudiced Campbell because, had counsel objected and preserved the issue, there is a reasonable probability that the result of the proceeding would have been different because the false testimony was material and therefore its use, if preserved, would have been reversible error.

False testimony is material if there is a reasonable likelihood that it would affect the outcome of the trial. *Robbins*, 360 S.W.3d at 459; *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). Here, Detective Hale's false testimony was material. Campbell had testified and raised the issue of self-defense, in part due to his knowledge that Steven Sr. was a Blood and that Campbell had previously reported him to no avail.[136] Detective Hale's false testimony rebutted each part of that.

By telling the jury that Steven Sr. would have been documented in the database based on a police officer's word or the word of a snitch, Detective Hale told the jury both: 1) that Steven Sr. wasn't a gang member; and 2) that Campbell had never, in fact, reported him. This undermined his credibility. Since Campbell's testimony was the basis of his self-defense claim, his credibility was essential to his defense. *See Braughton v. State*, 569 S.W.3d 592, 607–09, 610–13 (Tex. Crim. App. 2018) (jury's rejection of self-defense is based on credibility determinations).[137]

Thus, there is a reasonable likelihood that the admission of the false testimony affected the outcome of the trial. *Robbins*, 360

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[136] RR5:149–53.

[137] Indeed, the presumption that the jury made a credibility determination and disbelieved Campbell is why he cannot argue on appeal that the evidence is legally insufficient to support the jury's rejection of self-defense in this case. *See Braughton*, 569 S.W.3d at 607–13.

S.W.3d at 459; *Ghahremani*, 332 S.W.3d at 478. Because the false testimony was material, if counsel had objected to it and preserved the issue, there is a reasonable probability that but for counsel's inexplicable failure to object, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686; *Lopez*, 343 S.W.3d at 142.

Issues Three and Four
(Judgments & Bills of Costs)

There are errors in the judgments and the bills of costs. This Court should fix them.

Authority to Correct Judgments and Bills of Costs

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

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

This Court may modify a bill of costs on appeal because the bill of costs obligates an appellant to pay the items listed. *Jones v. State*, 691 S.W.3d 671, 679 (Tex. App.—Houston [14th Dist.] 2024, pet ref'd). A court of appeals may modify the bill of costs independent of 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.); *Contreras v. State*, Nos. 05-20-00185-CR, 05-20-00186-CR, 2021 WL

6071640, at *8 (Tex. App.—Dallas Dec. 23, 2021, no pet.) (mem. op., not designated for publication); *see also* Tex. R. App. P. 43.6 (a court of appeals "may make any … appropriate order that the law and the nature of the case require").

3. Issue 3: This Court should modify the judgments to correct multiple errors.

There are seven errors in the judgments that this Court should correct.

3.1. This Court should modify the aggravated-assault judgment to correct the offense for which Campbell was convicted.

The first error is in the aggravated-assault judgment, which says that Campbell was convicted of "AGG ASSAULT-FAMILY MEMBER."[138] That is incorrect.

A judgment must state the offense for which the defendant was convicted. Tex. Code Crim. Proc. art. 42.01, § 1(13). Campbell was indicted for, and therefore convicted of, aggravated assault by threat with a deadly weapon.[139] The indictment and jury charge each contained a family-member allegation, but the family relationship is not an element of second-degree aggravated assault. *Philmon v.*

[138] CR367:101.

[139] CR367:53.

State, 609 S.W.3d 532, 536 (Tex. Crim. App. 2020) (setting out elements of aggravated assault by threat with a deadly weapon).[140]

Because the indictment did not allege, and the jury did not find, that Campbell caused serious bodily injury, he was convicted of second-degree aggravated assault only. *See* Tex. Penal Code § 22.02(a)(2). This Court should therefore modify the judgment to read: "Offense for which Defendant Convicted: AGGRAVATED ASSAULT." Tex. R. App. P. 43.2(b).

3.2. This Court should modify both judgments to reflect the statutes for the offenses.

The next error is in both judgments: Neither lists the statute for the offense. Both contain a space labelled "Statute for Offense," but both are blank underneath that heading.[141]

The code of criminal procedure does not specifically require a judgment to state the statute for the offense. Instead, it requires the Office of Court Administration to promulgate a standardized felony judgment form, and it requires courts to use that form. Tex. Code Crim. Proc. art. 42.01, § 4.

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[140] The family relationship is an element of aggravated assault only if the offense is charged as a first-degree felony in which the defendant *both* 1) uses a deadly weapon *and* 2) causes serious bodily injury to a family member. Tex. Penal Code § 22.02(b)(1).

[141] CR366:415; CR367:101.

The standardized felony judgment form promulgated by OCA contains a field for the "Statute for Offense."[142] Accordingly, a court must include the statute for the offense on the judgment.

In these cases, the court did not include the statute for the offense in either judgment. This Court should modify the "Statute for Offense" in each judgment to say, respectively: "Tex. Penal Code § 19.02(b)" in the murder judgment, and "Tex. Penal Code § 22.02(a)(2)" in the aggravated-assault judgment.[143] Tex. R. App. P. 43.2(b).

3.3. This Court should delete $290 in duplicate consolidated court costs from the aggravated-assault judgment.

The third error is in the aggravated-assault judgment, which assesses $290 in court costs.[144] This is error because the same costs were also assessed in the murder case, but the code of criminal procedure requires that costs be assessed only once in a single 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 … only once against the defendant.

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[142] Office of Court Administration, *Rules & Forms—Standardized Felony Judgment Forms*, "Judgment of Conviction by Jury" & "Instructions for Felony Judgment Forms," online at https://www.txcourts.gov/forms/ (last visited Nov. 8, 2024).

[143] CR366:415; CR367:101.

[144] CR367:101.

Tex. Code Crim. Proc. art. 102.073(a). Each cost is assessed using the highest category of offense that is possible based on the defendant's convictions. *Id*. 102.073(b). *See Jones*, 691 S.W.3d at 678 (citing *Robinson v. State*, 514 S.W.3d 816, 828 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)).

In this case, the two indictments were tried together in a single criminal action, and Campbell was convicted of both offenses, so the court was authorized to assess each court cost only once. *Id.*

The record shows that the $290 in court costs assessed in each judgment comprises a $185 State Consolidated Court Cost and a $105 Local Consolidated Court Cost.[145] *See* Tex. Local Gov't Code §§ 133.102(a)(1) (requiring $185 State Consolidated Court Cost upon felony conviction); 134.101(a) (requiring $105 Local Consolidated Court Cost upon felony conviction).

These assessments are identical, so the trial court improperly assessed duplicate costs. This Court should leave the assessed costs in the higher-category murder judgment, and it should modify the aggravated-assault judgment to delete the duplicate $290 court costs. *Jones*, 691 S.W.3d at 678; Tex. Code Crim. Proc. art. 102.073(a), (b), Tex. R. App. P. 43.2(b).

[145] CR366:415 ($290 assessment in judgment), 418 (breakdown in bill of costs); CR367:101 ($290 assessment in judgment), 104 (breakdown in bill of costs).

3.4. This Court should delete $15 in duplicate fee assessments from the aggravated-assault judgment.

The fourth error is also in the aggravated-assault judgment, which assesses $40 in reimbursement fees.[146] This is error because $15 of the assessed fees are duplicative of fees assessed in the murder case.

The same rule that applies to duplicate court costs also applies to duplicate reimbursement fees:

> 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 … fee only once against the defendant.

Tex. Code Crim. Proc. art. 102.073(a). Each fee is assessed using the highest category of offense that is possible based on the defendant's convictions. *Id*. 102.073(b). *See Jones*, 691 S.W.3d at 678.

The bill of costs in each case shows that $20 of the assessed fees were for the following:

- Arrest w/out Capias $5
- Commitment Fee $5
- Release Fee $5
- Summon Jury $5[147]

The code of criminal procedure authorizes the assessment of each of these fees "to defray the cost of the services provided in the case by a

[146] CR367:101.

[147] CR366:418; CR367:104.

peace officer." *See* Tex. Code Crim. Proc. art. 102.011(a)(1) ($5 for arrest without warrant), (6) ($5 for commitment or release), (7) ($5 for summoning a jury, if a jury is summoned).

Despite the plain language of art. 102.073, which limits the assessment of each fee only once per trial, this Court has concluded that the code of criminal procedure allows the *Arrest* fee to be assessed for each conviction if the record shows that the defendant was arrested for each offense. *Guerra v. State*, 547 S.W.3d 445, 447 (Tex. App.—Houston [14th Dist.], 2018, no pet.). That is because the code "specifically requires that the [Arrest] fee 'shall be assessed on conviction, regardless of whether the defendant was also arrested at the same time for another offense, and shall be assessed for each arrest made of a defendant arising out of the offense for which the defendant has been convicted.'" *Id.* (quoting Tex. Code Crim. Proc. art. 102.011(e)).

That statute does not apply to the Commitment, Release, or Summon-Jury fees, however, so those remain subject to the one-assessment-per-trial provision. Tex. Code Crim. Proc. art. 102.011(e) (referring only to a fee "under Subsection (a)(1) or (2)").

Accordingly, the Arrest fee can be assessed for each conviction in this case, but the other three fees cannot. The court improperly assessed the Commitment, Release, and Summon-Jury fees twice. This Court should leave the assessed fees in the higher-category

murder judgment, and it should modify the aggravated-assault judgment to delete the duplicate $15 in reimbursement fees. *Jones*, 691 S.W.3d at 678; *Guerra*, 547 S.W.3d at 446–47; Tex. Code Crim. Proc. art. 102.073(a), (b), Tex. R. App. P. 43.2(b).

3.5. This Court should delete the $5 "Release" fee from both judgments.

The fifth error is in both judgments, each of which assess $5 for "Release" (though, as noted in the previous issue, the assessment in the aggravated-assault judgment is duplicative).[148] This is error because the record does not show that Campbell was ever released by a peace officer.

A court is authorized to assess a $5 reimbursement fee for "commitment or release" "to defray the cost of the services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(6). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[149]

In 2014, this Court concluded that a $5 Release fee was supported by the record when the defendant was released on bond

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[148] CR366:415 ($295 fee assessment in judgment), 418 (breakdown of fees in bill of costs); CR367:101 ($40 fee assessment in judgment), 104 (breakdown of fees in bill of costs).

[149] 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 Code of Criminal Procedure art. 1011.

prior to trial. *Garza v. State*, 425 S.W.3d 649, 654 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). In this case, by contrast, the record shows that Campbell was never released prior to trial. After Campbell was arrested on June 20, 2022, a magistrate set bail at $100,000 in the murder case and $75,000 in the aggravated assault case.[150] Campbell, being indigent, never posted bail, and he remained in custody during the pendency of his charges.[151] Thus, he was never released from jail prior to trial and cannot be charged $5 for a release that never happened.

There is a line of cases from other intermediate courts saying that the Release fee may be assessed even if a defendant is never released prior to trial, so long as the defendant is sentenced to prison. *Briceno v. State*, 675 S.W.3d 87, 97 (Tex. App.—Fort Worth 2023, no pet.); *Willingham v. State*, No. 13-22-00162-CR, 2023 WL 4942017, at *12

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[150] CR366:10; CR367:14. The magistrate set bond conditions in the murder case, and the trial court also set bond conditions after the murder indictment was presented. CR366:23–24, 28–30.

[151] CR366:31 (order appointing counsel, noting "DEFENDANT IN CUSTODY"), 38 (precept to Sheriff to serve indictment, noting that Campbell is "A PRISONER IN YOUR CUSTODY"), 415 (judgment giving Campbell "Jail Time Credit" of "776 DAYS," which corresponds to the number of days between June 10, 2022, the date of arrest, and July 25, 2024, the date sentence was imposed); CR367:30 (case reset form, noting "DEFENDANT IN CUSTODY"), 54 (precept to Sheriff to serve indictment, noting that Campbell is "A PRISONER IN YOUR CUSTODY"), 64 (case reset form, noting "DEFENDANT IN CUSTODY"), 101 (judgment giving Campbell "Jail Time Credit" of "776 DAYS," which corresponds to the number of days between June 10, 2022, the date of arrest, and July 25, 2024, the date sentence was imposed).

(Tex. App.—Corpus Christi–Edinburg Aug. 3, 2023, pet. ref'd) (mem. op., not designated for publication); *Williams v. State*, 495 S.W.3d 583, 591–92 (Tex. App.—Houston [1st Dist.] 2016, pet. dism'd). That is because, those cases say, the defendant is "released" from the custody of the local Sheriff to the custody of the Texas Department of Criminal Justice. *Id.*

There are two problems with these cases. First, they're untethered from the English language. "Release" is a transitive verb that means "to set free from restraint, confinement, or servitude." *Release*, Merriam-Webster's Collegiate Dictionary (11th ed. 2020). Moving someone from jail to prison is a lot of things—taking, transferring, delivering—but it's not releasing. A prisoner who is transferred directly from a jail to a prison is no more "released" than is a fish that is transferred from a livewell to a cutting board.[152]

Second, they're distinguishable from the record in this case. In *Briceno*, *Willingham*, and *Williams*, the trial court's judgments ordered the *Sheriff* to transfer the defendant to prison. *Briceno*, 675 S.W.3d at 97; *Willingham*, 2023 WL 4942017, at *12; *Williams*, 495 S.W.3d at 591–92. A sheriff is a peace officer. Tex. Code Crim. Proc. art. 2.12(1). Thus, even if transferring a person to prison is

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

"releasing" them, the records in those cases showed that the service was performed by a peace officer.

In Campbell's case, by contrast, each judgment orders an "authorized agent" of *either* "the State of Texas" *or* "the County Sheriff" to transfer him to prison.[153] The record doesn't say who this "authorized agent" is or whether they are a peace officer. And, assuming that Campbell was held in the county jail before being sent to prison, the law is clear that county jailers are *not* peace officers. Tex. Code Crim. Proc. art. 2.31. Thus, unlike in *Briceno*, *Willingham*, and *Williams*, the record here does not show that Campbell was released "by a peace officer," as required by Tex. Code Crim. Proc. art. 102.011(a)(6).

Because the record does not show that Campbell was ever released by a peace officer, the record does not support the assessment of the $5 Release fee in either judgment. This Court should delete it. Tex. R. App. P. 43.2(b).

3.6. This Court should delete $255 from the reimbursement fees in the murder judgment because only four subpoenas were validly served by a peace officer.

The sixth error is in the murder judgment, which assesses $275 in witness-summoning fees. This is $255 too much because most—all

[153] CR366:416; CR367:102.

but four—of the subpoenas were not validly served by a peace officer.

3.6.1. A court may not impose a cost for a service that was not performed, so it cannot impose a witness-summoning fee for a subpoena that was not served by a peace officer.

A court is authorized to assess a $5 reimbursement fee "for summoning a witness" "to defray the cost of the services provided in the case by a peace officer." Tex. Code Crim. Proc. art. 102.011(a)(3). But a cost may not be imposed for a service not performed. *Id.* art. 103.002.[154] Indeed, the Court of Criminal Appeals has held that the witness-summoning fee is constitutional only because it serves a legitimate purpose of reimbursing "the expenses … *actually incurred by peace officers* in serving process on witnesses needed for the defendant's proceedings." *Allen v. State*, 614 S.W.3d 736, 745 (Tex. Crim. App. 2019) (emphasis added).

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

[154] Again, doing so used to be called "Extortion." *See* 1925 Vernon's Code of Criminal Procedure art. 1011.

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 concluded the same. *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).

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

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

1) reading the subpoena in the hearing of the witness;
2) delivering a copy of the subpoena to the witness;
3) electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address of the witness; or

> 4) mailing a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness unless [two exceptions apply].

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

Service not made in accordance with the statute is invalid. *Ex parte Terrell*, 95 S.W. 536, 537–38 (Tex. Crim. App. 1906) (applying 1895 Vernon's Code of Criminal Procedure art. 515, which is the direct predecessor of the modern art. 24.04); *see also Fuller v. State*, No. 14-94-00064-CR, 1996 WL 11176, at *1–2 (Tex. App.—Houston [14th Dist.] Jan. 11, 1996, no pet.) (not designated for publication) (witness was not validly served, to authorize a writ of attachment, when the record did not show compliance with the statutory methods of service).

Even if a subpoena is validly served, it cannot be assumed that a *peace officer* served the subpoena. The subpoena may name a person "to summon the person whose appearance is sought." *Id.* art. 24.01(b). That person must be either 1) a peace officer, or 2) at least 18 years old and, at the time the subpoena is issued, not a

participant in the proceeding for which the appearance is sought.[155] *Id.* Accordingly, a subpoena may be served by someone who is not a peace officer, so long as they otherwise qualify under the statute. *See* Tex. Att'y Gen. Op. No. KP-0207 (2018).

3.6.2. The record shows that 54 of 58 subpoenas in the murder case were not validly served by a peace officer, so this Court should strike the fees that the trial court imposed for them.

Here, the bill of costs in the murder case shows that the court assessed $275 for "LEA Summon Witness."[156] At $5 per subpoena, this amount equates to 55 served subpoenas.

The record tells a different story. The record contains 58 unique subpoenas.[157] It contains 55 unique returns.[158] Three subpoenas have

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

[156] CR366:418.

[157] CR366:41–42, 44, 84–97, 157, 159, 164, 203–04, 215–29, 331–45, 366–72, 423.

[158] CR366:43, 46, 98–104, 111, 148, 150, 152–55, 158, 160, 165, 205–6, 230–37, 311–12, 314, 316, 324, 326, 346–48, 350, 352–54, 358–63, 373–78, 424. The record contains 125 returns that are duplicates of these 55. CR366:105–10, 112–147, 161–63, 166, 238–310, 318, 320, 322, 355–57.

no return at all, nine were returned "Un-Executed," two did not properly summon a witness, and 40 have returns that do not show valid service by a peace officer. Altogether, this means that only four subpoenas in the murder case were validly served by a peace officer.

3.6.2.1. The 3 unreturned subpoenas do not support a witness-summoning fee.

There are **three** subpoenas that do not have a corresponding return.[159] With no return in the record, there is no evidence that a peace officer served these 3 subpoenas on a witness; accordingly, there is nothing to reimburse, and the subpoenas cannot form the basis of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson,* 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

3.6.2.2. The 9 "Un-Executed" subpoenas do not support a witness-summoning fee.

Of the 55 subpoenas with returns, nine were returned "Un-Executed."[160] The returns for these "Un-Executed" subpoenas describe the "action[s] taken to summon" the witnesses:

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[159] CR366:335 (Duncan), 337 (Fletcher), 370 (Lee). The subpoena application for Duncan and Fletcher specifically said to "Hold on service." CR366:329. The application for Lee contains no such instruction. CR366:364.

[160] CR:366:148, 154–55, 158, 205–06, 312, 314, 316.

- Not Employee (x1):
    - … Be advised that [the witness] was employed by HFSC but is no longer. Please contact our HR Department … for possible forwarding information[161]
- Peace Officer (x3):
    - Personal Service Attempted No one answered the door. Slipped subpoena thru door or placed in secure location[162]
    - Personal service ATTEMPTED. No answer—slid subpoena through the door. (x2)[163]
- No Method Attempted (x2):
    - HCSO requires 10 business days prior to court date to process and serve subpoenas unless an email address is attached (x2)[164]
- Email (x3):
    - Be advised that [witness] is not employed by Houston Forensic Science Center, Inc.[165]
    - Be advised that [witness was] employed by HFSC but [is] no longer. Please contact our HR Department … for possible forwarding information. (x2).[166]

These nine 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*,

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[161] CR366:148.

[162] CR366:154.

[163] CR366:155, 158.

[164] CR366:205, 206.

[165] CR366:312.

[166] CR366:314.

2023 WL 4758470, at *2. Therefore, they 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.* Thus, no expenses were actually incurred, and these **nine** "Un-Executed" subpoenas cannot form the basis of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson,* 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

12 down—46 to go.[167]

3.6.2.3. 42 subpoenas that were returned "Executed" either did not properly summon a witness or were not validly served by a peace officer.

The remaining 46 subpoenas were returned "Executed."[168] These subpoenas were issued in seven sets—the first six requested by the District Attorney's Office, and the last by the Public Defender's Office. Let's take each in turn:

The first set comprises two subpoenas *duces tecum* to the Houston Fire Department for medical records.[169] The problem with

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[167] At this point, even 46 subpoenas would support only $230 in witness-summoning fees, rather than the $275 that was assessed.

[168] CR366:43, 46, 98–104, 111, 150, 152–53, 160, 165, 230–37, 311, 324, 326, 346–48, 350, 352–54, 358–63, 373–78, 424.

[169] CR366:39.

both of these subpoenas is that they do not properly summon a witness. Neither one commands a witness to appear in court with the documents on "a specified date." *See* Tex. Code Crim. Proc. art. 24.01(a), 24.02.

Instead, each commands the Houston Fire Department to appear "Instanter."[170] The subpoenas issued August 4, 2022, but the record shows that nothing happened in court on that date.[171] Therefore, these **two** subpoenas did not properly summon a witness, and the $5 witness-summoning fee should not have been assessed for them.

The second set comprises fourteen subpoenas for witnesses to appear on November 6, 2023.[172] The record contains eleven "Executed" returns for this set.[173] Those returns describe the "action[s] taken to summon" the witnesses, and ten of them show invalid service:

- Peace Officer (x9):
    - Delivered to HPD Liaison (x7)[174]

[170] CR366:41, 44. Each subpoena provides an alternative: Either 1) call an Assistant District Attorney or her paralegal when the "records are ready to be picked up" or 2) mail the records to the Assistant District Attorney.

[171] CR366:41, 44, 449.

[172] CR:366:82–83.

[173] CR366:98–104, 111, 150, 152–53.

[174] CR366:99–104, 111.

    - Personal Service Completed By serving witness's mother …[175]
    - Personal service COMPLETED by serving the MOTHER of the witness.[176]
- Email (x1):
    - The Houston Forensic Science Center (HFSC) received from your office a zip file containing [the subpoena]. The practice of HFSC's Client Services & Case Management Division is to log each subpoena into HFSC's tracking system and *to forward the subpoena to the intended recipient*. Although this message acknowledges HFSC's receipt of the subpoena, *HFSC is not the agent of any natural person to whom the subpoena is addressed and is not accepting service on behalf of any natural person*.[177]

None of this constitutes proper service under art. 24.04.

Delivery of a subpoena under art. 24.04(a)(2) requires "personal delivery." *Hedgecock v. State*, No. 05-07-01315-CR, 2008 WL 4756990, at *4–5 (Tex. App.—Dallas Oct. 31, 2008, no pet.) (mem. op., not designated for publication) (determining that "delivery" of out-of-county subpoena under Tex. Code Crim. Proc. art. 24.17 is the same as "delivery" of an in-county subpoena under art. 24.04(a)(2), and concluding that when a witness "was not served via personal

[175] CR366:152.

[176] CR366:153.

[177] CR366:150 (emphasis added).

delivery," the witness "was not properly served"). The returns show that none of these ten subpoenas were personally delivered to the respective witnesses. Instead, seven were delivered to an unnamed "HPD Liaison," while two others were given to the witnesses' mothers.

Electronic service under art. 24.04(a)(3), meanwhile, requires transmission of a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address of the witness. Tex. Code Crim. Proc. art. 24.04(a)(3). The email return shows that the subpoena was *not* sent to the witness, but rather to HFSC, which expressly refused to accept service on her behalf.[178] And neither the subpoena request nor the subpoena itself shows *any* "known electronic address of the witness."[179]

Accordingly, **ten** of the eleven executed subpoenas from the second set were not validly served by a peace officer, no expenses were legitimately incurred by a peace officer in serving process on a witness, and these subpoenas cannot support the assessment of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson*, 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

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[178] CR366:150.

[179] CR366:83 (no electronic address listed for Teresa Soto), 92 (same).

The third set comprises three subpoenas for witnesses to appear on November 8, 2023.[180] The record contains two "Executed" returns for this set.[181] **One** of the returns says that a peace officer "Delivered" it "to HPD Liaison" rather than the witness.[182] This is not valid service, as delivery requires personal delivery to the witness. *Hedgecock*, 2008 WL 4756990, at *4–5. Accordingly, no expenses were legitimately incurred by a peace officer in serving process on the witness, and this subpoena cannot support the assessment of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson*, 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

The fourth set comprises sixteen subpoenas for witnesses to appear "any time from 6/28/24-7/12/24."[183] The record contains eleven "Executed" returns for this set.[184] One return says that it was executed by "a District Attorney"—not a peace officer.[185] Seven returns state that a peace officer "Delivered" the subpoena "to HPD liaison" rather than the witness,[186] which is not valid service.

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[180] CR366:156.

[181] CR366:160, 165.

[182] CR366:165.

[183] CR366:212–13.

[184] CR366:230–37, 311, 324, 326.

[185] CR366:230.

[186] CR366:231–37.

Hedgecock, 2008 WL 4756990, at *4–5. And two more returns state that a peace officer sent subpoenas via "Email" to HFSC, but neither the request, the subpoenas, or the returns identify *any* electronic address to which these subpoenas were sent.[187] Tex. Code Crim. Proc. art. 24.04(a)(3). Thus, **ten** of the eleven executed subpoenas from this set were not validly served by a peace officer, no expenses were legitimately incurred by a peace officer in serving process on a witness, and the subpoenas cannot support the assessment of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson*, 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

The fifth and sixth sets comprise 22 subpoenas for witnesses to appear "any time from 7/19/24-8/2/24."[188] The record contains 19 "Executed" returns from these sets.[189] Seven returns say that they were executed by "a District Attorney"—not a peace officer.[190] Three say that a peace officer "Delivered" the subpoena "to HPD liaison office" rather than to the witness,[191] which is not valid service. *Hedgecock*, 2008 WL 4756990, at *4–5. Six say that a peace officer

[187] CR366:213 (request), 218 (Leggroan subpoena), 223 (Soto subpoena), 324 (Leggroan return), 326 (Soto return).

[188] CR366:328–30, 364.

[189] CR366:346–48, 350, 352–54, 358–63, 373–78.

[190] CR366:346, 373–78.

[191] CR366:352–54.

"Delivered" the subpoena "to HPD liaison office," rather than to the witness, via "Email,"[192] which—in the absence of *any* electronic addresses for the witnesses in the request, subpoenas, or returns—is neither valid service by delivery nor valid electronic service. *Hedgecock*, 2008 WL 4756990, at *4–5; Tex. Code Crim. Proc. art. 24.04(a)(2), (3).

Two other returns from this set state that HFSC received the subpoenas via "Email," but that HFSC was not the agent of the witnesses and was not accepting service on their behalf.[193] Moreover, for one of these two witnesses, HFSC further explicitly stated that it "cannot acknowledge receipt of this electronically transmitted subpoena as described in Article 24.04(b)."[194] These returns show that the electronic subpoenas were *not* sent to the witnesses, but rather to HFSC, which expressly refused to accept service on their behalf. And neither the subpoena request nor the subpoenas show *any* "known electronic address" of the witnesses.[195] Tex. Code Crim. Proc. art. 24.04(a)(3).

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[192] CR366:358–63. There are three other "email to HPD liaison office" returns that are otherwise duplicates of the three "Delivered to HPD liaison office" returns. CR366:355–57.

[193] CR366:348, 350.

[194] CR366:348.

[195] CR366:328–29 (request), 332 (Leggroan subpoena), 339 (Soto subpoena).

Accordingly, **18** of the 19 executed subpoenas in these two sets were not validly served by a peace officer, no expenses were legitimately incurred by a peace officer in serving a witness, and the subpoenas cannot support the assessment of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson*, 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

The final set comprises **one** subpoena that was issued to the Harris County Sheriff's Office Records Custodian upon request of the Public Defender's Office.[196] The return states that it was executed by "a Private Agency"—not a peace officer.[197] Accordingly, this subpoena was not served by a peace officer, no expense was incurred by a peace officer, and the subpoena cannot support the assessment of a $5 witness-summoning fee. *Allen*, 614 S.W.3d at 745; *Rhodes*, 676 S.W.3d at 233; *Wilson*, 2023 WL 4758470, at *2; *Robles*, 2018 WL 1056482, at *6.

Thus, of the 46 "Executed" subpoenas, 42 cannot support the assessment of a $5 witness-summoning fee. That leaves *four* subpoenas for which a $5 fee could be properly assessed, for a total

[196] CR366:423–24.

[197] CR366:424.

assessment of $20 rather than $275.[198] This Court should modify the judgment to reduce the amount of assessed reimbursement fees by $255. Tex. R. App. P. 43.2(b).

3.7. This Court should delete $20 from the reimbursement fees in the aggravated-assault judgment because the four subpoenas did not properly summon a witness.

The seventh error is in the aggravated-assault judgment, which assesses $40 in reimbursement fees. In addition to the $15 in duplicate fees previously addressed, an additional $20 was improperly assessed because it includes $5 witness-summoning fees for four subpoenas that did not properly summon a witness.

The bill of costs in the aggravated-assault case shows that the court assessed $20 for "LEA Summon Witness."[199] At $5 per subpoena, that amount equates to 4 subpoenas. The record contains 4 subpoenas[200] and 4 returns.[201]

Each subpoena is for records.[202] None, however, commands a witness to appear in court with the documents on "a specified date." *See* Tex. Code Crim. Proc. art. 24.01(a), 24.02. Instead, each

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[198] CR366:98, 160, 311, 347. These are electronic subpoenas for which the request includes a known electronic address for the witness. CR366:83, 156, 213, 329.

[199] CR367:104.

[200] CR367:38, 41, 44, 61.

[201] CR367:40, 43, 46, 62.

[202] CR367:38, 41, 44, 61.

commands an organization—the Houston Fire Department, HCA Houston Healthcare Northwest, and the Harris County Sheriff's Office Inmate Disciplinary Records Division—to appear "Instanter."[203] Three of the subpoenas issued July 18, 2022, and the fourth subpoena issued March 13, 2023, but the record shows that nothing happened in court on either of those dates.[204]

Accordingly, none of these four subpoenas properly summoned a witness, so the $5 witness-summoning fee should not have been assessed for any of them. This Court should delete another $20 from the assessed reimbursement fees in the aggravated-assault case. Tex. R. App. P. 43.2(b).

4. This Court should remove the assessed costs from the bills of costs because the trial court ordered that the costs are not payable until Campbell is released from confinement.

The error in the bills of costs is that they include any costs at all. Each judgment orders the assessed court costs to be paid later, but the record also contains a signed bill of costs for each case, which

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[203] *Id.* The subpoenas also provided alternatives to appearance in court. For the first three: Either 1) call or email an Assistant District Attorney when the "records are ready to be picked up" or 2) to mail the records to the Assistant District Attorney. CR367:38, 41, 44. For the fourth: "send" the records to an Assistant District Attorney. CR367:61.

[204] CR:367:38, 41, 44, 61, 131.

makes the costs payable now.[205] This Court should modify the bills of costs to remove the not-yet-payable costs.

4.1. 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.

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.

[205] CR366:416, 418; CR367:102, 104.

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*, 698 S.W.3d 265, 271 (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.).[206]

[206] 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.) (mem. op., not designated for publication); *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).

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

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.

4.3. The trial court ordered Campbell to pay costs upon release from confinement, but the signed bills of costs make the costs payable now, so this Court should modify the bills to remove the premature costs.

In this case, the judgments assess court costs and fees, as required by the code of criminal procedure.[207] Tex. Code Crim. Proc. art. 42.16. The judgments also order that the costs and fees be paid later—"Upon release from confinement."[208] Even though the court did not conduct an on-the-record ability-to-pay inquiry during sentencing,

[207] CR366:415; CR367:101.

[208] CR366:416; CR367:102.

and Campbell did not object to that failure,[209] the court nevertheless wrote in each 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.[210]

This order—that Campbell 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 45 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.

But even though the trial court ordered that the costs be paid later, the record includes a bill of costs in each case that itemizes the cost assessment and is signed on behalf of the Harris County District Clerk by a deputy.[211] That signed bill of costs makes the costs payable now rather than later, and it "obligates" Campbell "to pay the items listed." Tex. Code Crim. Proc. art. 103.001(b); *Jones*, 691 S.W.3d at 679.

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[209] RR7:70–71.

[210] CR366:416; CR367:102.

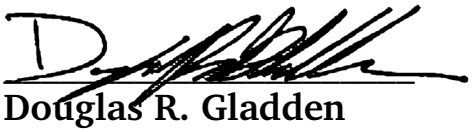
[211] CR366:418; CR367:104.

The bills therefore conflict with the trial court's judgments. The solution here is for this Court to modify the bills 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 bills of costs accordingly.

Prayer

Campbell prays that this Honorable Court reverse the trial court's judgments and remand for a new trial with effective counsel.

Respectfully submitted,



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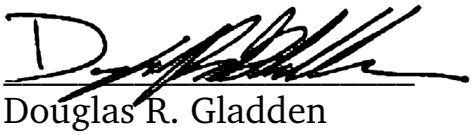

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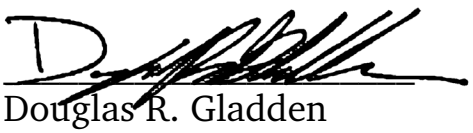

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