

No. 21-2007

FILED

JAN 14 2022

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Amador Rodriguez Rose — PETITIONER
(Your Name)

VS.

U.S. District Ct. Northern Dist. of Tx. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the 5th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Amador Rodriguez
(Your Name)

21 E.M. 247 Byrd Unit
(Address)

Huntville Tx. 77320
(City, State, Zip Code)

(Phone Number)

N/A

QUESTION(S) PRESENTED

1.) How does the Prosecution bare the burden of Proving a Crime that was Not Alleged in Indictment returned by the Grand Jury?

a.) Is this Indictment - The Original Indictment?

3.) Does A deadly weapon have to be used or exhibited (in the Crime which I was convicted) in order to Enter Affirmative Finding in Judgment?

4.) Was This Indictment and Count Presented to The Proper Court?

5.) Could The State Prove 2nd Count of Indictment As It was Returned by the Grand Jury?

6.) Does The 2nd Count track The Language of Any offense under Law?

7.) Did The Language in Courts Charge To The Jury "That The defendant used or Exhibited a deadly weapon, to-wit: a Motor Vehicle, during the Commission of The offense" Not broaden what was Actually Alleged in Original Indictment.

(Questions) Presented

8.) Does a person not have to be under arrest

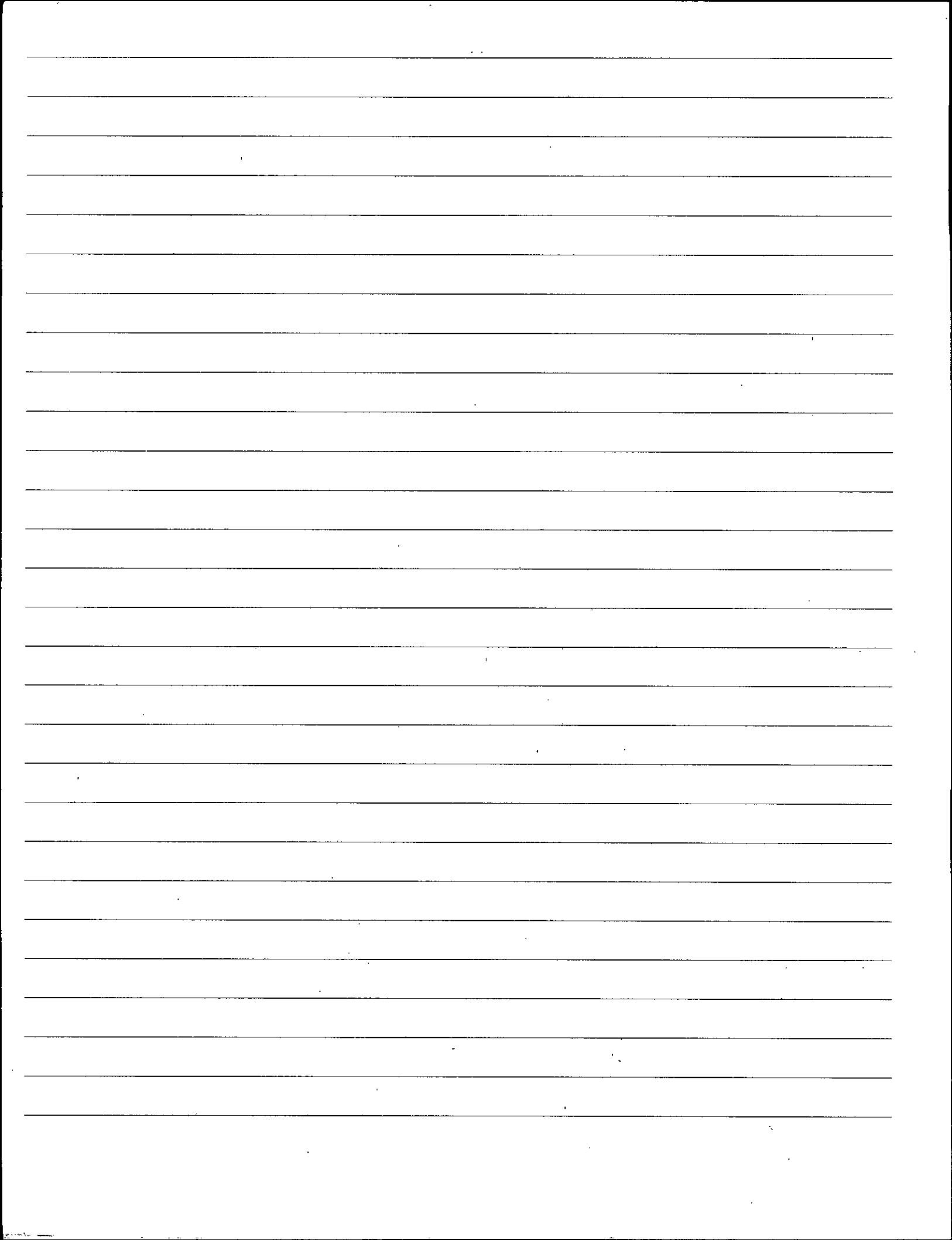
at some point, in order to be convicted

for "Evading arrest" in a Motor Vehicle, and the

arrest is made without a warrant and

Probable Cause?





LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[V] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Lorie Davis, Director,
 Texas Department of Criminal Justice
 Correctional Institutions Division
 Respondent
 P.O. Box 12548,
 Capital Station
 Austin TX 78711
 * Ali M. Nasser *
 Assistant Atty. Gen.

* Lead Counsel for Respondent

RELATED CASES

Rodriguez v. State, No. 07-14-00407-CR, 7th Court of Appeals
 Judgment Entered August 8, 2016
 Rodriguez v. State, No. PD-1014-16 Court of Criminal Appeals of Texas
 Judgment Entered December 7, 2016
 Ex Parte Rodriguez, No. 2014-402,814-A 14th dist. Court Lubbock Tx.
 Judgment Entered August 18, 2017
 Rodriguez v. Davis, No. S:17-CV-0266-C U.S. District Court for
 The Northern District of Texas Judgment Entered Dec. 14, 2020
 Rodriguez v. Lumpkin No. 20-11272 U.S. Court of Appeals
 for the 5th Circuit. Judgment Entered October 27, 2021.

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Texas Penal Code 1.04	7
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Texas Penal Code 38.04 (b)(a)(a)	1, 19

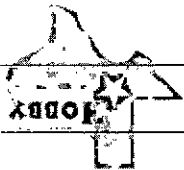


Table of Authorities Cited

Cases - State Pg Number

Ex Parte Jones 957 S.W.2d 849 13,14

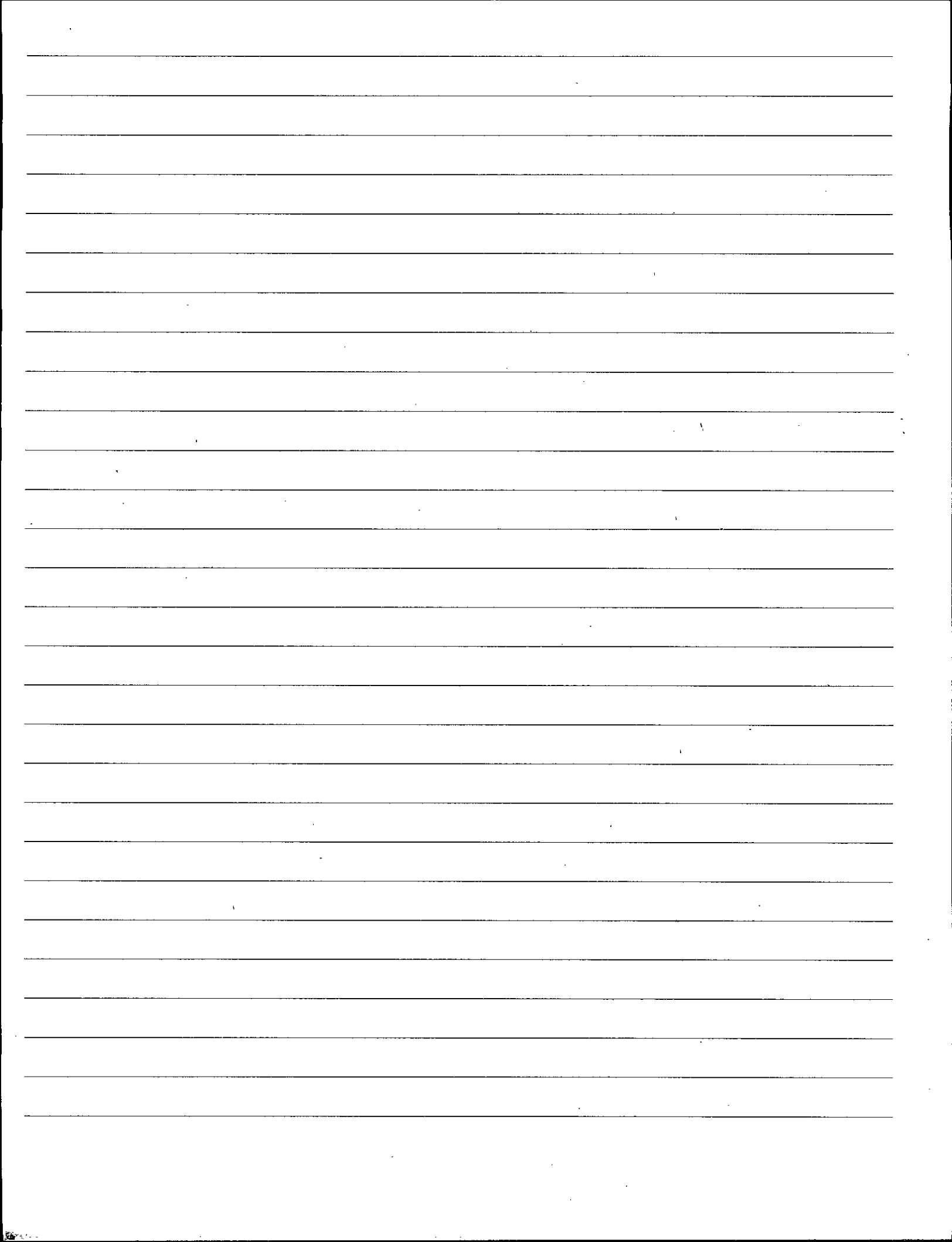
Narrow v. State 835 S.W.2d 642 14

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Tata v. State 446 S.W.3d 456 (2014) 10

Ward v. State 829 S.W.2d 487 (1992) 10



IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix b to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the 11th Circuit Court of Appeals appears at Appendix E to the petition and is
VL4354388@7 Rodriguez, 2016 VL4354388@7
☒ reported at Rodriguez, 2016 VL4354388@7; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was October 27, 2007.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was Sept. 20, 2017.
A copy of that decision appears at Appendix E.

☒ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. I
U.S. Const. Amend. VI
U.S. Const. Amend. XIV

Case Law Federal

Hobbs act 18 U.S.C. § 1951 Pg 20

18 U.S.C. § 924 (c)(1) Pg 11, 12

State Statutory Law

Texas Code of Crim. Procedure art. 21.02(a) Pg 15

Texas Code of Crim. Procedure art. 27.09(c) Pg 15

Texas Code of Crim. Procedure art. 28.10 Pg 9

Texas Code of Crim. Procedure art. 28.11 Pg 9, 10

Texas Code of Crim. Procedure art. 42.01 (a1) Pg 21, 22

Texas Code of Crim. Procedure art. 42.12-35(a)(a)

. Pg 6, 11, 21, 22

Texas Penal Code 1.07 Pg 7

Texas Penal Code 12.35 (c)(1) Pg 7, 11, 21

Texas Penal Code 38.04 (b)(a)(a) Pg 1, 19

STATEMENT OF THE CASE

On June 28, 2013, I was charged in a single count indictment, Cause No. 2013-439260 that was presented on July 23, 2013 for Evading Arrest or Detention (using a vehicle) under Tx. Penal Code § 38.04(b)(2)(a). On July 2, 2014 - while still in custody, the State returned with a superseding indictment for the same offence of Evading Arrest or Detention in a vehicle that occurred on June 28, 2013. Cause No. 2014-402814. However this time it was a 2 count indictment and it had a different officers name as to who was attempting to arrest or detain. The 2nd count of this indictment is mainly what this appeal is about. I was convicted on November 18, 2014, The Jury also made an affirmative finding on the 2nd count, and I was sentenced to

Statement of The Case

45 years T.O.C.J. Institutional Division

The 2nd Count of Indictment Alleges the

Following: And the defendant did then

and there use and exhibit a deadly

weapon, to-wit: Motor Vehicle, that in the

Manner of its use and intended use was

capable of causing death and serious

bodily injury. These allegations were on

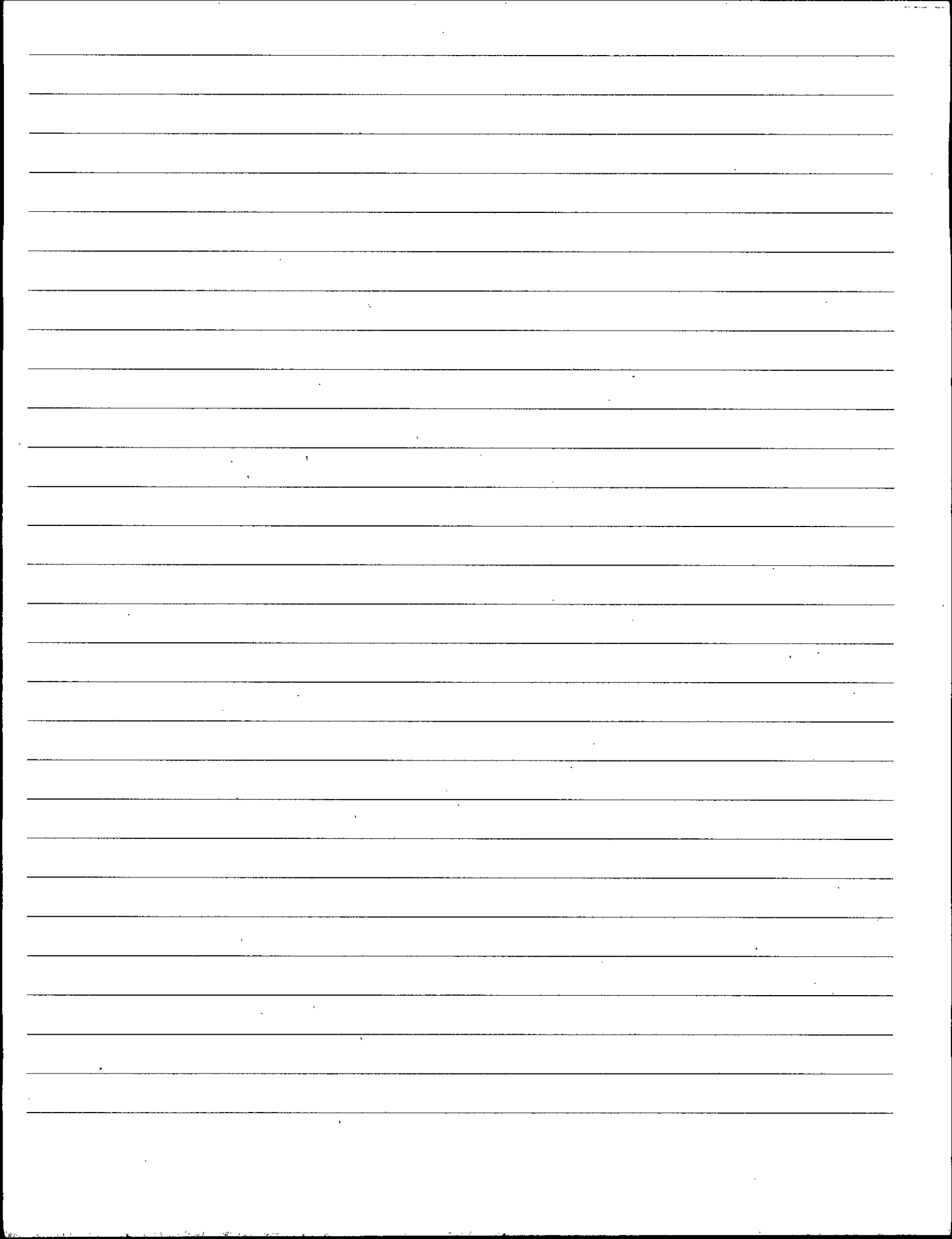
Superseding Indictment that came a year later.

what changed 1 year later? I have no victim

in my conviction for Evading Arrest. In

The Courts charge to the jury paragraph

4. States the following in Part - The





Kossie v. Thaler, 423 Fed. Appx. 434, 437-438 (5th Cir. 1991)

U.S. v. Piquem 922 F.2d 249, 253 (5th Cir. 1991)

conjunctively (And) and proved disjunctively (or)

Permit that a disjunctive statute be plead

Place. Both Federal law and Texas law

became a deadly weapon in the first

a offenses, and Abanded how the vehicle

Courts Charge to the jury joined these

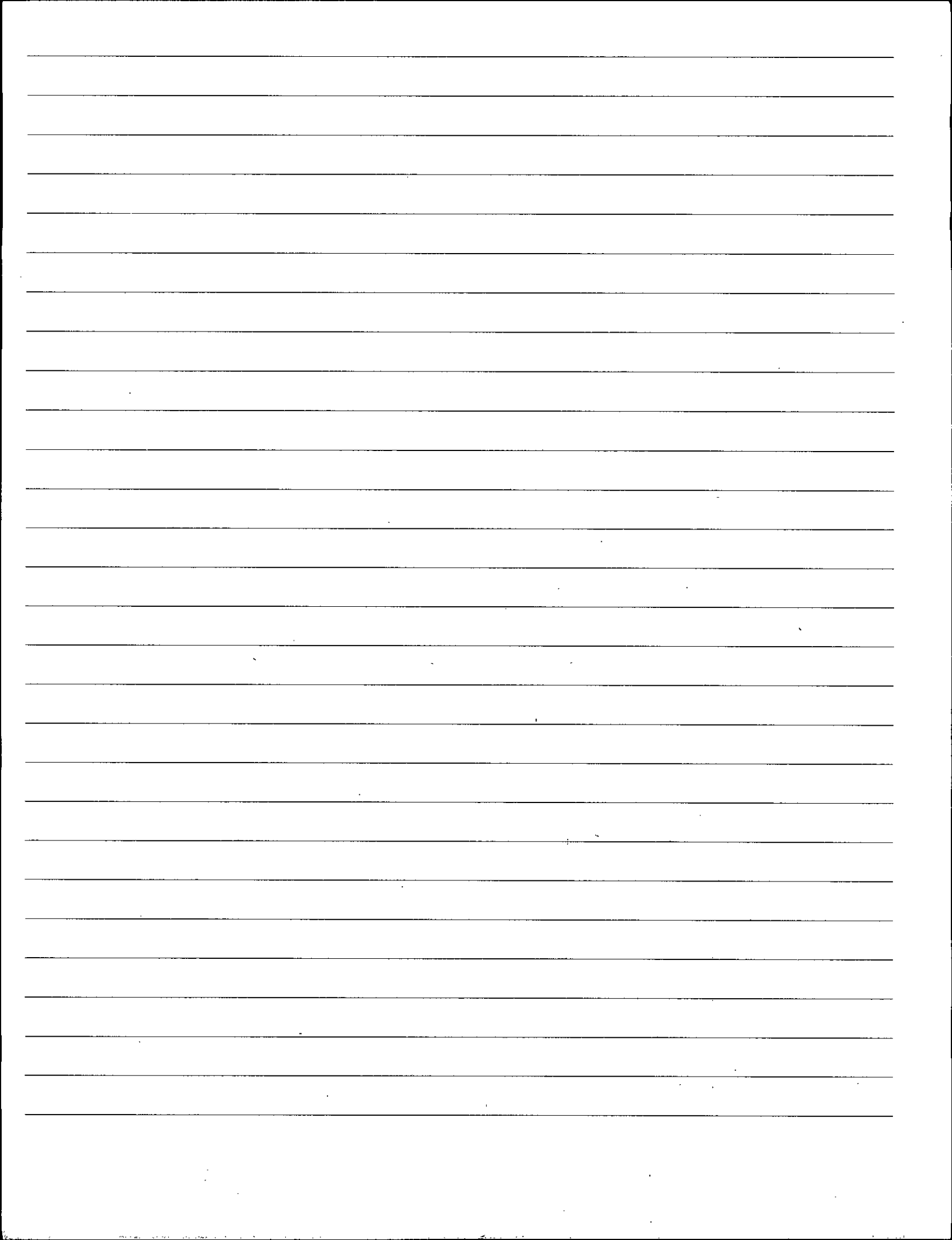
The Indictment Alleges no such thing. The

THE COMMISSION OF THE OFFENSE.

Weapon, to-wit: a motor vehicle, DURING

"the defendant used or exhibited a deadly

Prosecution has the burden of proving



(Circuit 2011) Kossie's indictment stated

that he "used and exhibited" a deadly

weapon in the course of the robbery, while

evidence from trial only showed "Kossie" exhibited"

a fire arm - and was sufficient evidence of

Aggravated Robbery Under Texas Law. In

Kitchen v. State 823 S.W. 2d^{250, 258} his indictment

stated in part that he committed Murder in the

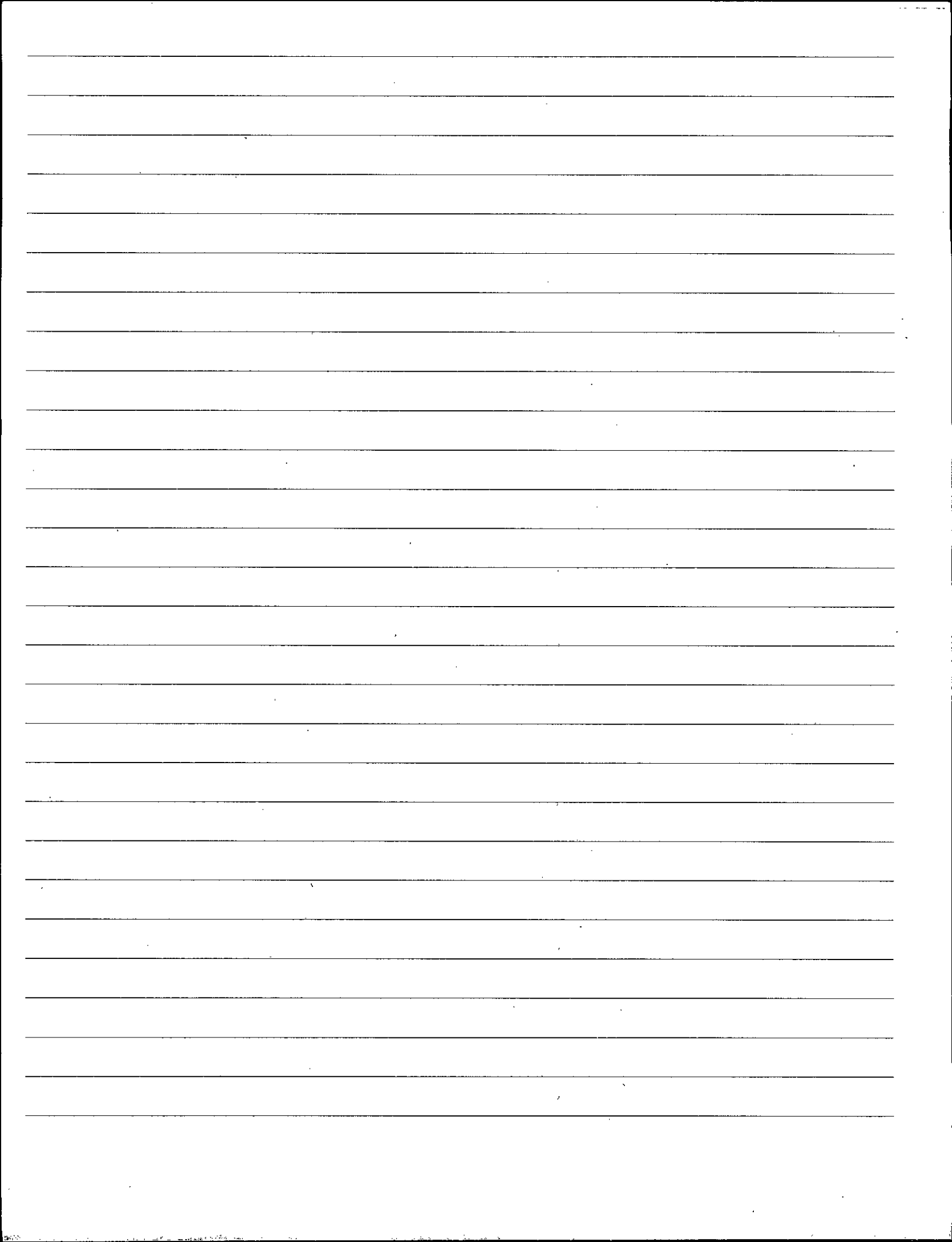
Course of Kidnapping, robbery and Sexual Assault.

So all the State had to prove was that he

Kidnapped, robbed, or sexually assaulted his victim

in the course of the Murder and it became

Capitale Murder. In U.S. Pilgrum and Allen,





a firearm. In All These Cases that A

~~used and carried a firearm~~ carried or used

~~to a drug trafficking crime, and not that he~~

~~that he carried a firearm during and in relation~~

the jury could convict Allen only if it found

V. Webb (5th Cir. 1984) Under the amended indictment,

that he carried "or" used a Fire arm, See U.S.

been convicted if the jury found "either"

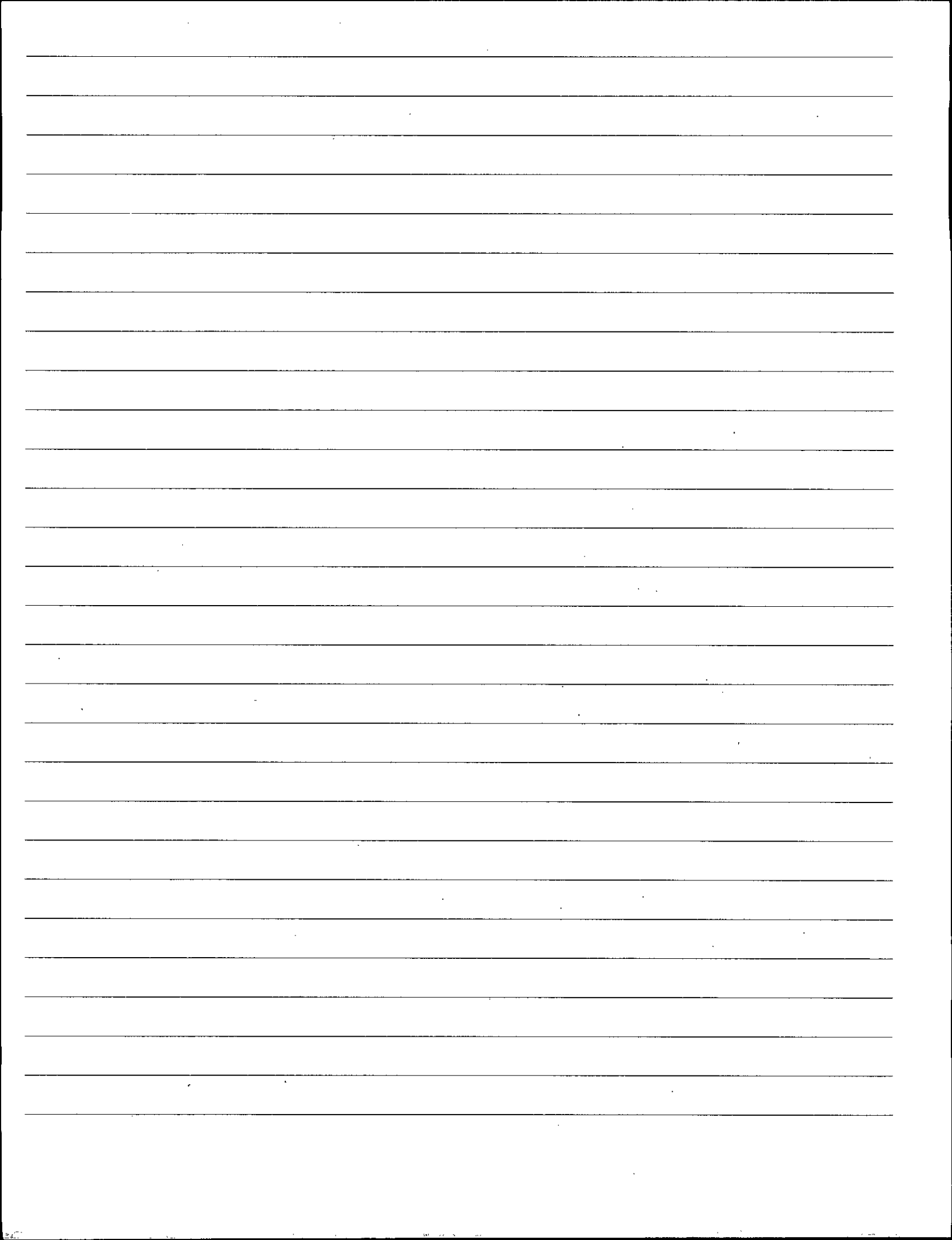
and proper jury instructions, Allen could have

drug trafficking crime. The original indictment

used a Firearm "during and in relation to a

Allens indictment alleged that he carried "and"

922 F.2d 249, 253 (1991 5th Cir.), sec. 13.



deadly weapon was used or exhibited

or that the murder took place have

Something in common. They have this

language that constitute an act... In the

Course of the Robbery... Murder In the

Course of Kidnapping Robbery and Sexual Assault

... Carried and used a Firearm "During² in

relation to a drug trafficking crime"

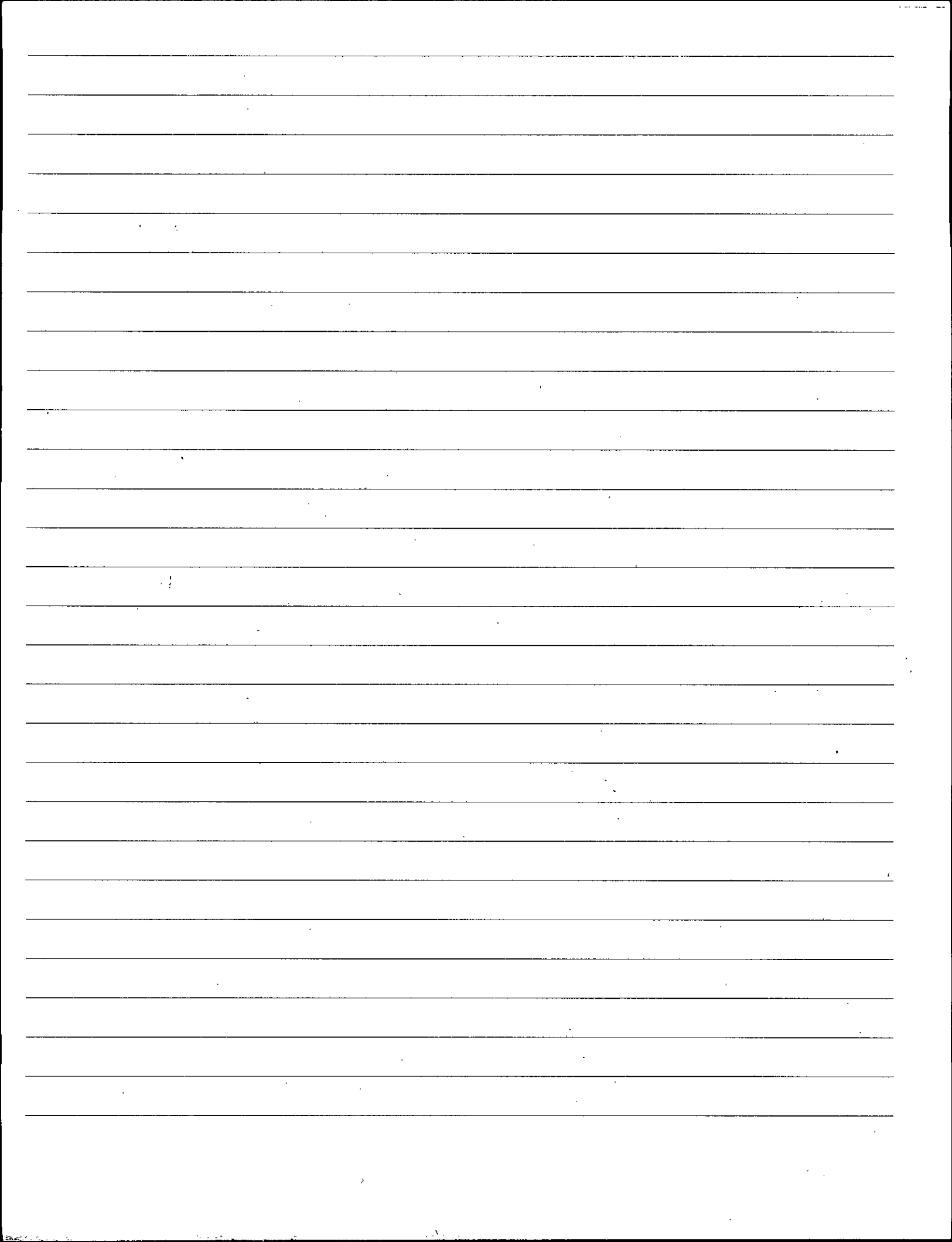
Texas Penal Code 12.35(c)(1), art. 42.12(3)(g)(a)(a)

of The Texas Code of Criminal procedures are

both related to deadly weapon, The only

difference is that one 12.35(c)(1) is a state

Jail Punishment enhancement, and 42.12(3)(g)



(a)(a) is a ~~pen~~ punishment provision.

However both have this similar language

in there provisions. "That a deadly weapon

as defined in Section 1.07, Penal Code, was used

or exhibited during the Commission of a

Felony offense, or during Immediate Flight there-

from. In my case Penal Code 1A.35(c)(1) is what

They used to trigger the entry of The Affirmative

Finding in My judgment. However that Penal

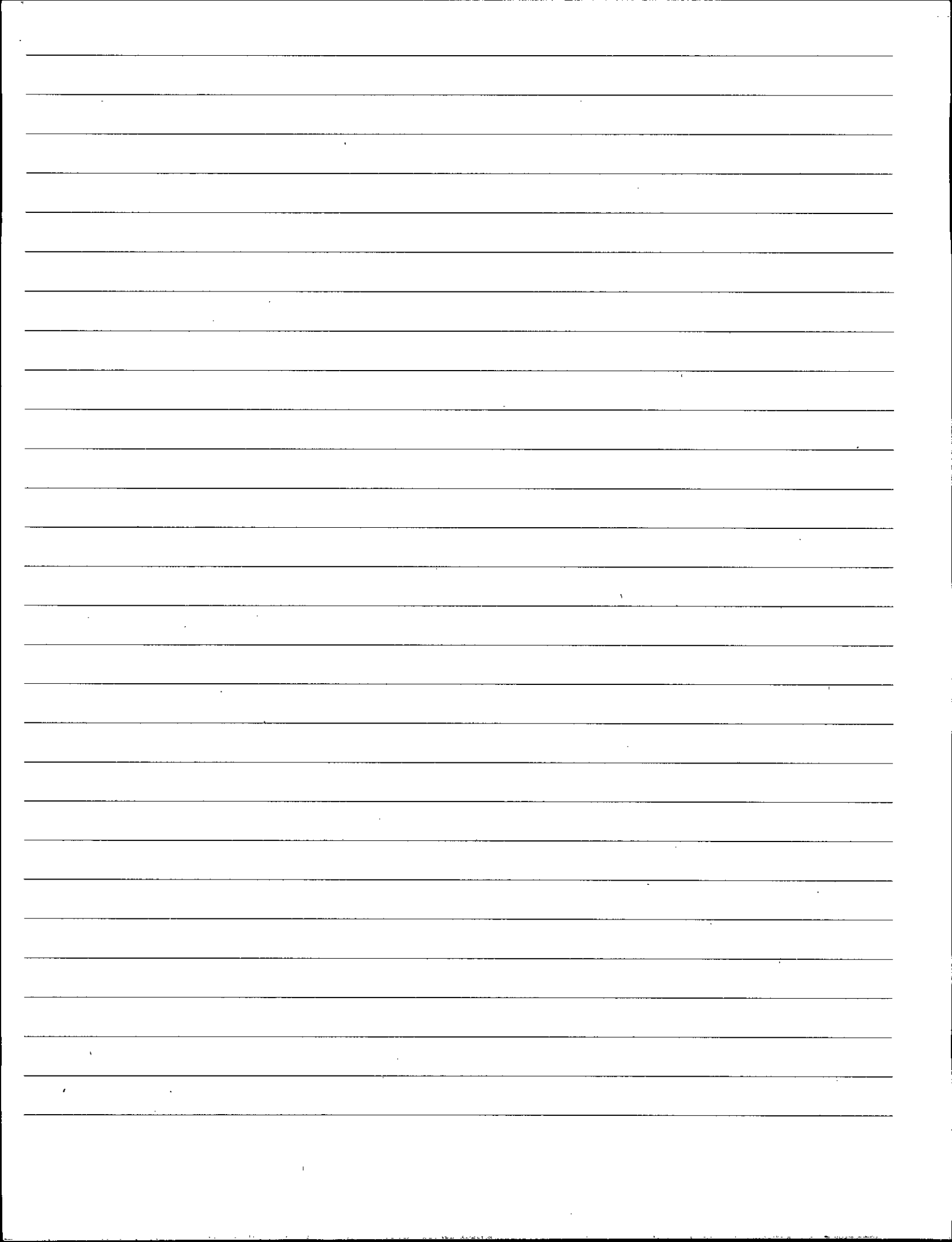
Code does not state that if that finding is made

that the trial Court "shall" enter that finding in

judgment. The State is under the impression

that the indictment alleges an offense in the





conjunctive "and" and proved one of their theories "or" in the disjunctive. ~~It~~ even

then, the state did not return a general

Verdict. See Courts Charge (Special Issue).

The 5th U.S.C.A. forbids Amendment of an

indictment by the Court, whether actual or

Constructive. U.S. v. Wacker, 72 F.3d 1453, 1474

(10th Cir. 1995).

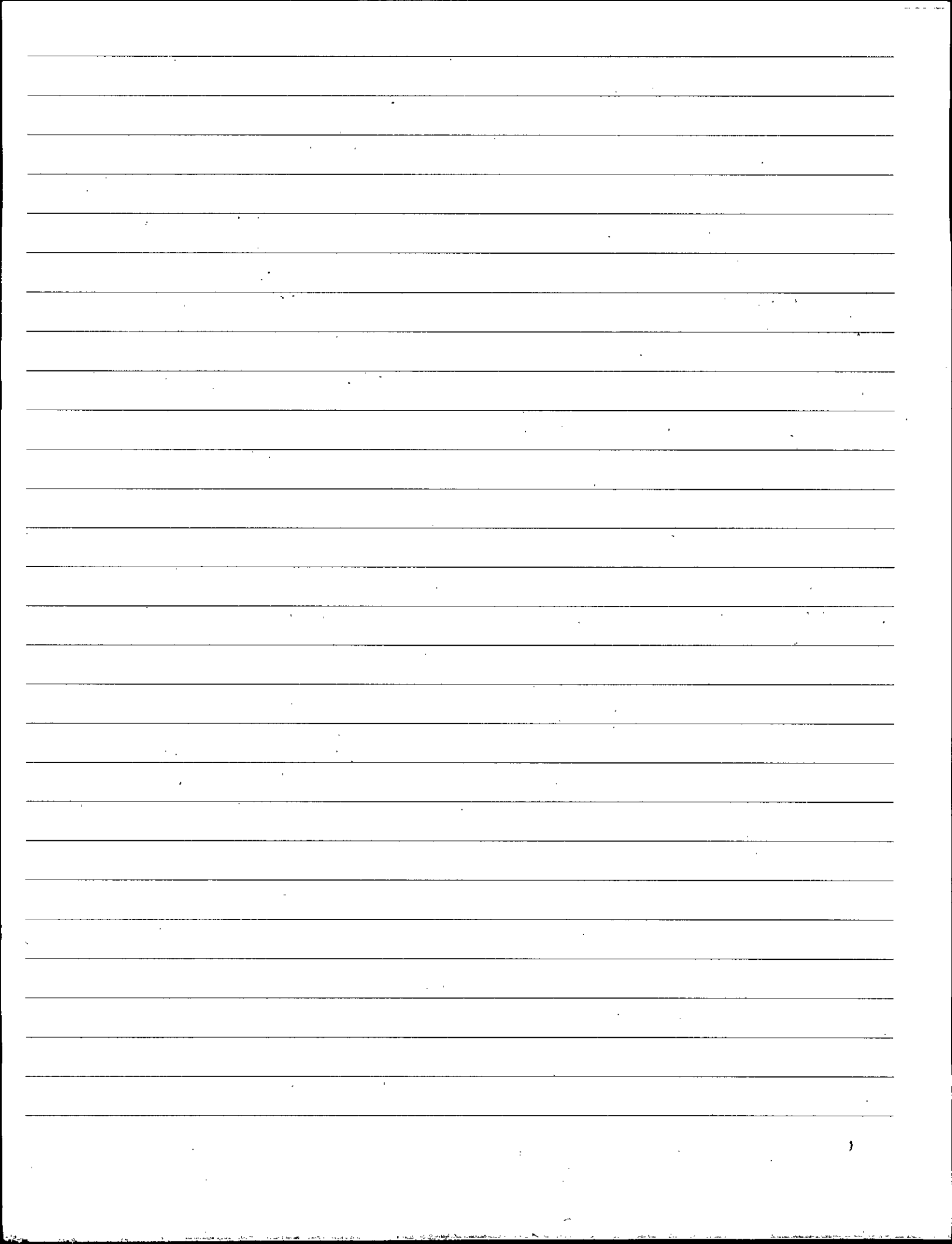
2) Is this the Original Indictment? or did

The Courts New Charge in Special issue become

official Indictment? If the Original indictment

remains official, the 2nd Count is Not an

offense nor a crime by itself, And in





and 28.11. All amendments must be made

indictment. See Tex. Code Crim. Proc. art. 28.10

Texas law permits the Amendment of an

No 2014-03814 exhibit B has no such language.

the Commission of the offense, my Indictment

deadly weapon was used or exhibited - During

"Presented in and to said Court," and that the

2nd Count State in Part: That it was further

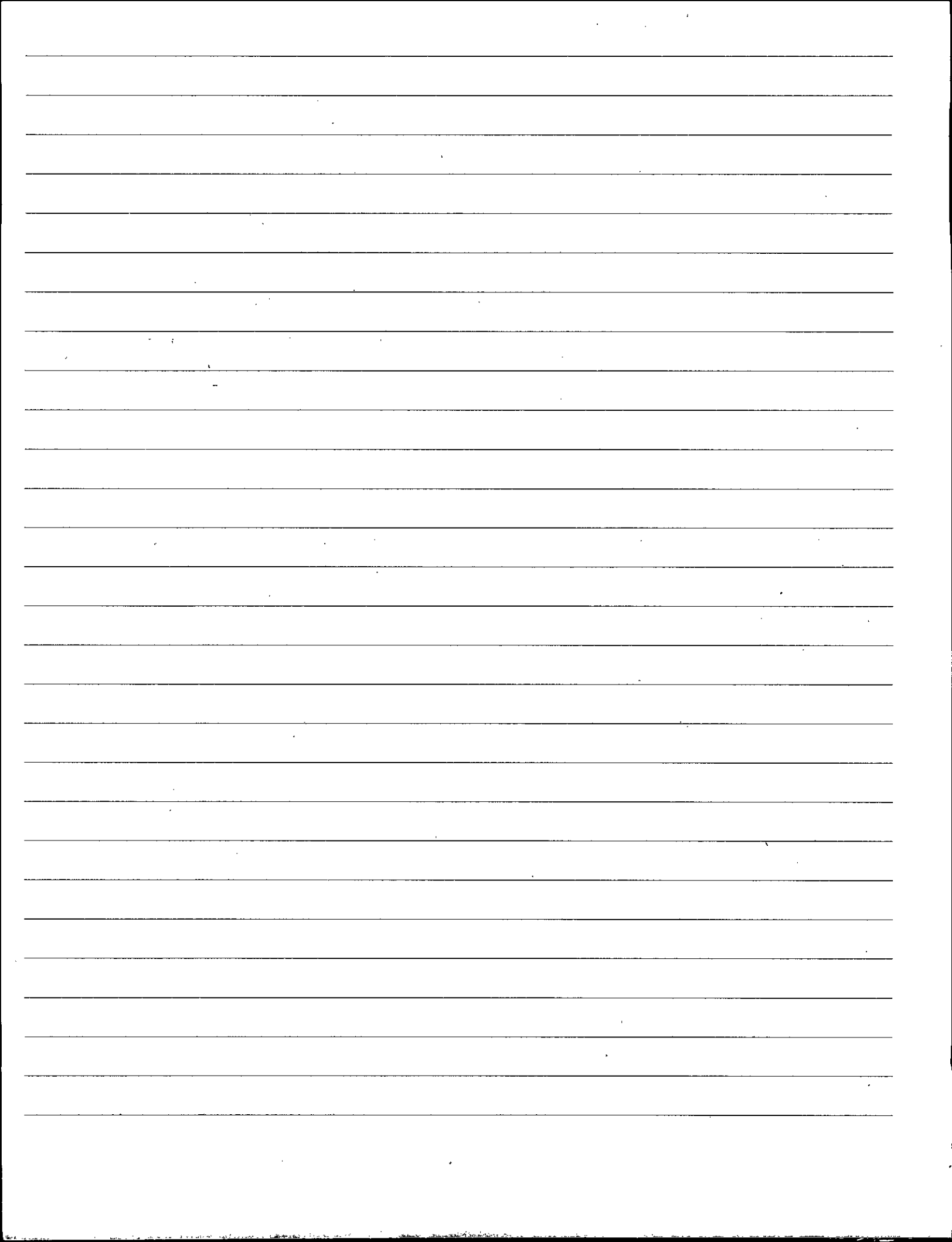
Some form of deadly weapon. These indictments

Count indictments with 2nd Count being

Indictments. All these indictments are 2

or Anyone else to prove anything. See

That Case it is impossible for the State



with the leave of the trial court, and under

its discretion Tex. Code Crim. Proc. art. 28.11. The

State must request the trial court's permission

before amending a charging instrument.

Ward v. State 829 S.W.2d 787 (Tex. Crim. App.

1992) overruled on other grounds, Riney v. State

88 S.W.3d 561 (Tex. Crim. App. 2000). A motion for leave

to amend is an appropriate vehicle to put the amend-

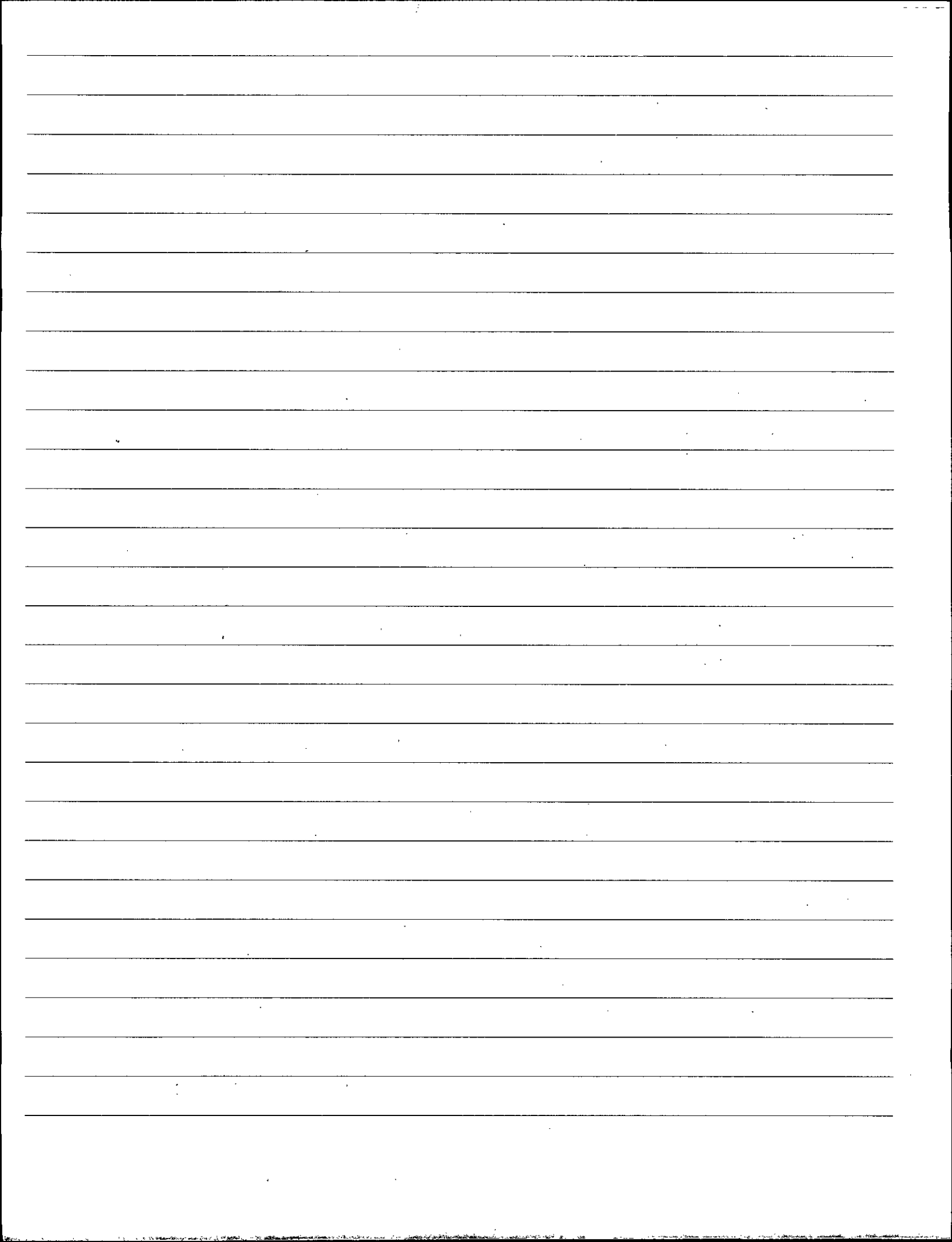
ing process in Motion. Id. In this case, no

such motion was filed, ~~therefore~~ A written amend-

ment must be submitted to the trial court and included

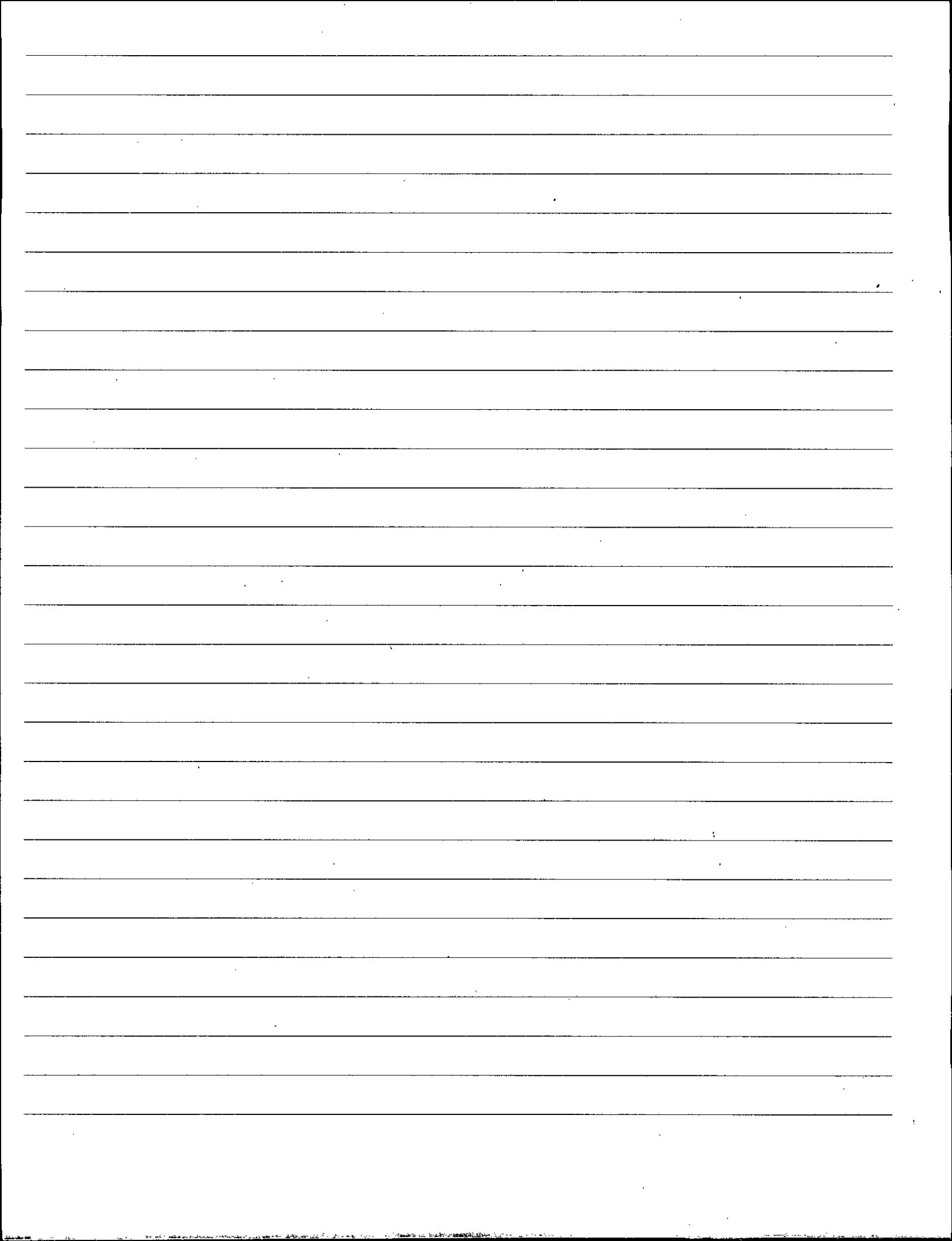
in the record to be valid. See Tate v. State, 446

S.W.3d 456 (Tex. App.-Houston [1st Dist.] 2014 pet. rev'd)





If the State could of Plead the offense that was supposedly returned by the grand jury, there would of have been no need to change the offense in the courts change Special Issue. See paragraph 11 of Special Issue, and Count 2 of "Official indictment" 3.) Does a deadly weapon, (a Motor Vehicle) have to be used in the transaction from which the Felony conviction was obtained in order to trigger the provisions of Penal Code 12.35(c)(4) or art 42.12 (3)(g)(a)(a) ? 18 U.S.C. § 924(c)(1) is a Federal firearm (deadly weapon) offense That is like 12.35(c)(1) and 42.12 3g(a)(a)1



18 U.S.C. § 924(c)(1) - As explained in U.S.

V. Combs, 369 F.3d 945 (2004) contains two

separate offenses: "One for possession of a

firearm "In Furtherance of" a drug traff-

icking crime" and one for using or carrying

a firearm: ~~during and in relation to a drug~~

trafficking crime. "use" we explained, is a higher

standard of conduct than "possession" but "in

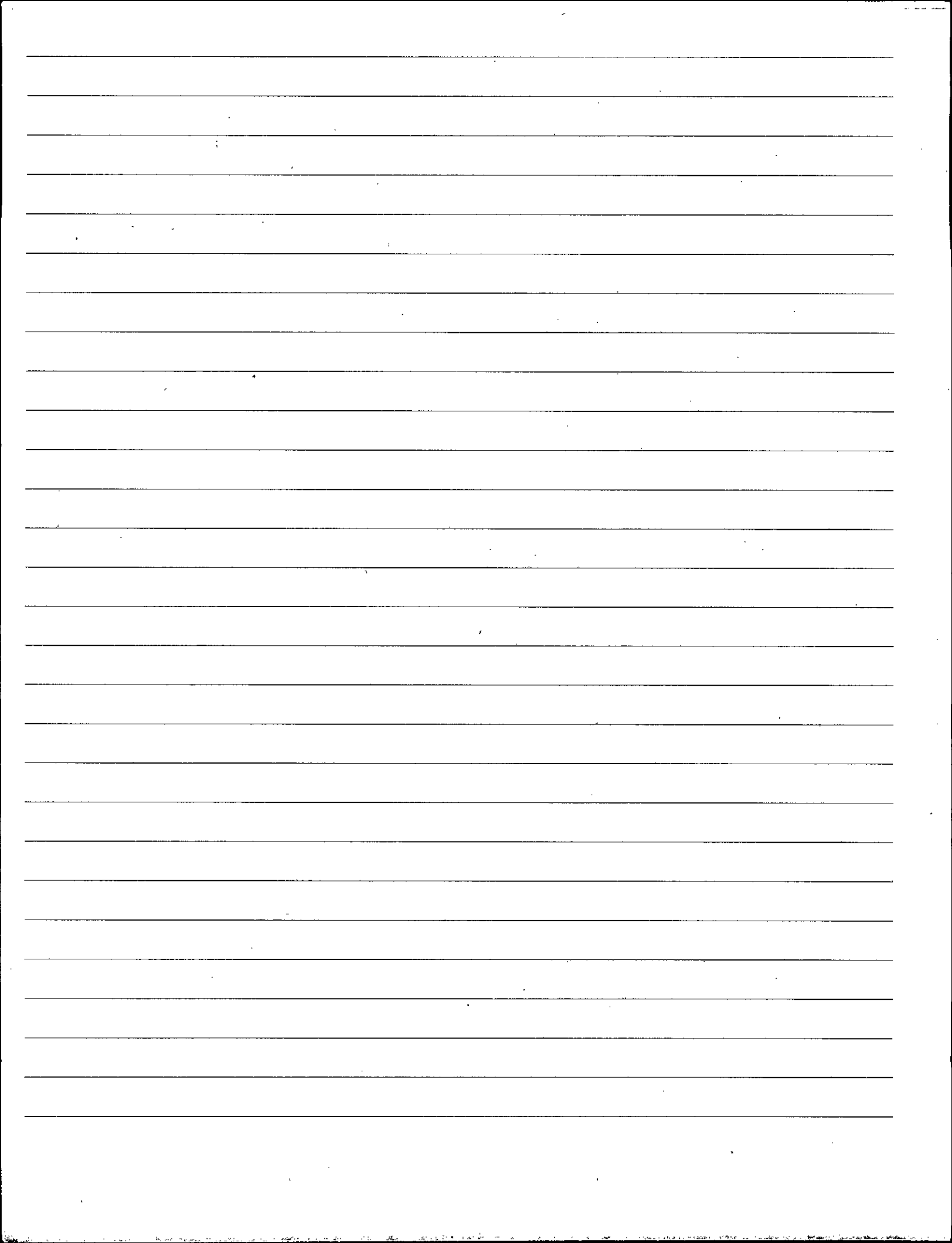
Furtherance of" is a higher standard of

Participation than "during and in relation to"

In Combs it was held that the district court

"Constructively amended" Count 4 of his indictment

when the defendant was charged with the



possession crime but the jury instructions

mixed in the lower standard of participation

from the use offense *Id.* @ 396. Thus the

district court "literally altered" the indictment

and *Combs* was convicted of a crime that was

not the subject of his indictment. we held

this to be plain error because it directly violated

the 5th U.S.C.A guarantee that a defendant be held

to Answer only for the charges levied by the grand

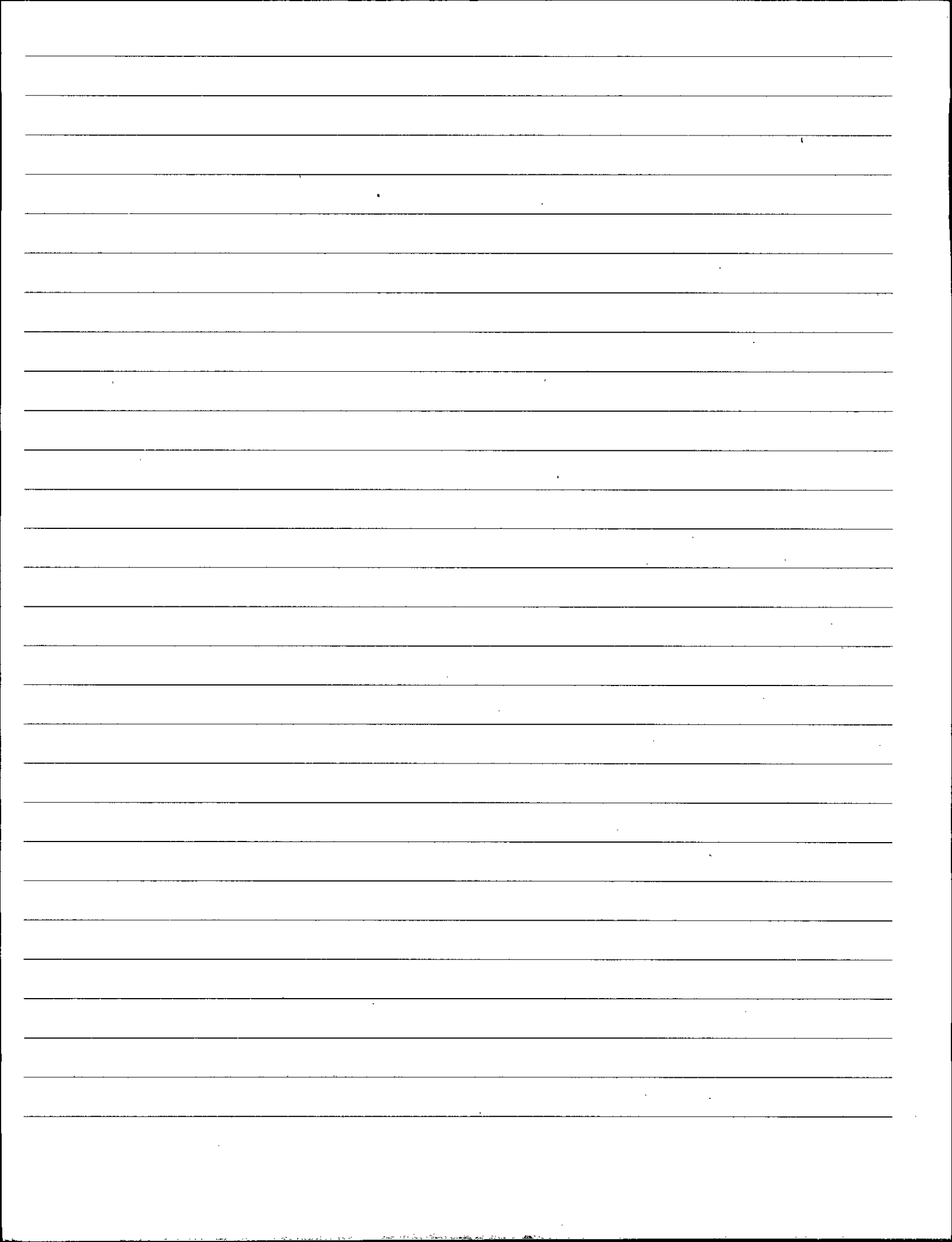
jury. *Ex Parte Jones*, 951 S.W.2d 849 (Tx. Crim. App. En banc)

held that: The deadly weapon "Must" have been used during

transaction from which Felony conviction arose in order to

trigger entry of affirmative finding. See Also





Narroz v. State, 835 S.W. 2d @ 642, The

Court of Criminal Appeals of Texas En Banc held that

1) That the defendant was provided sufficient notice that

the state intended to seek a deadly weapon finding

and 2.) defendant could not be subject to Affirmative

Finding of a deadly weapon use, "where there was no

associated Felony facilitated" by the defendant's possession

of the firearm, Narroz's ground for review was

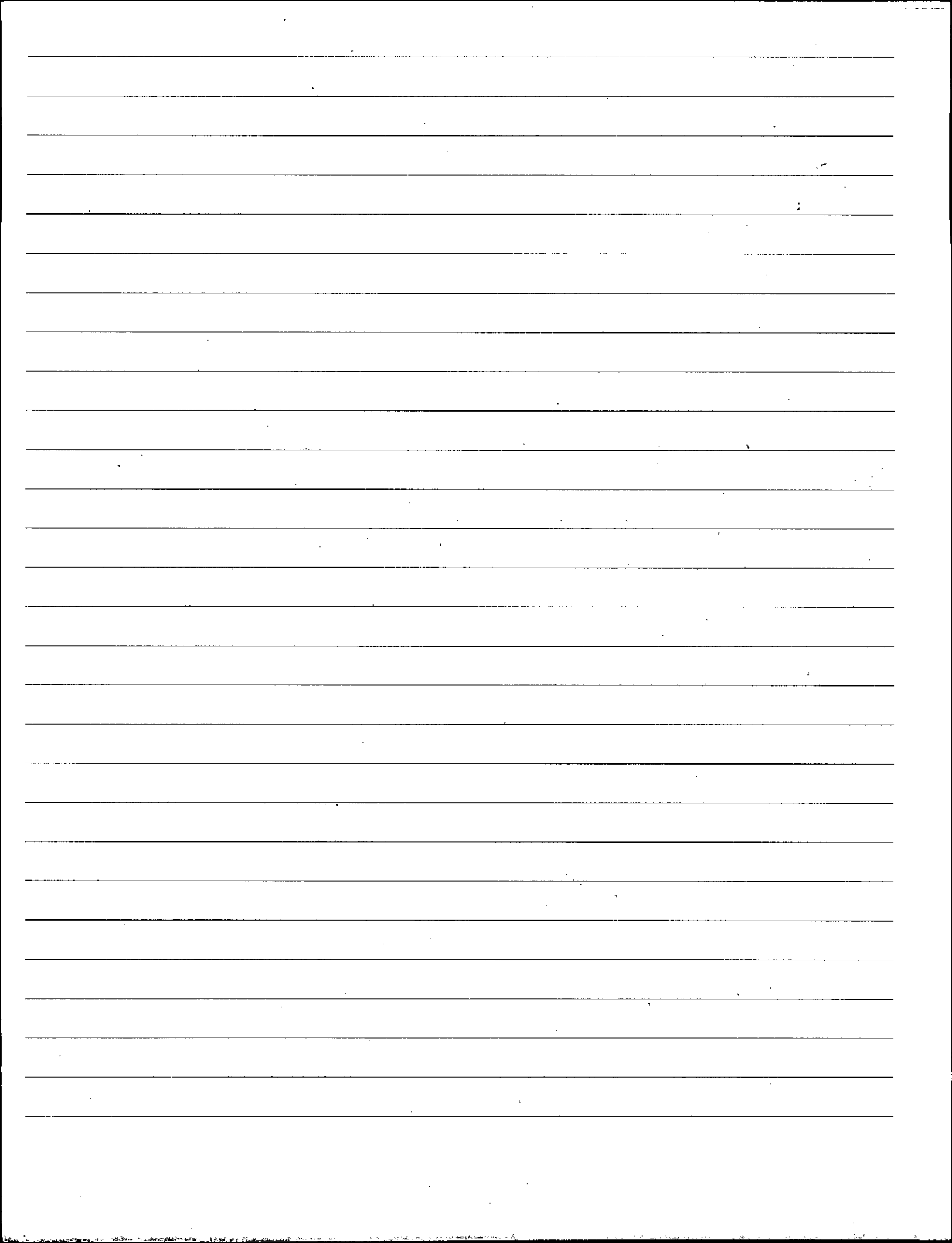
sustained - Because there was no associated Felony

by appellant's short barrel firearm, and the affirmative

Findings from the judgment was deleted. This case

is also controlled by Narroz, and Ex Parte Jones

Because according to the charge that was returned



by the grand jury - There is no associated

Felony in between those 2 offenses. Therefore

the affirmative findings should be deleted from the

judgment.

4.) Was this indictment and Count Presented To Proper

Court? art. 21.02 (a) must show that the same was

presented in the district Court of the county where the

grand jury is in session. art. 21.09(1) states that

an exception to an indictment or information is

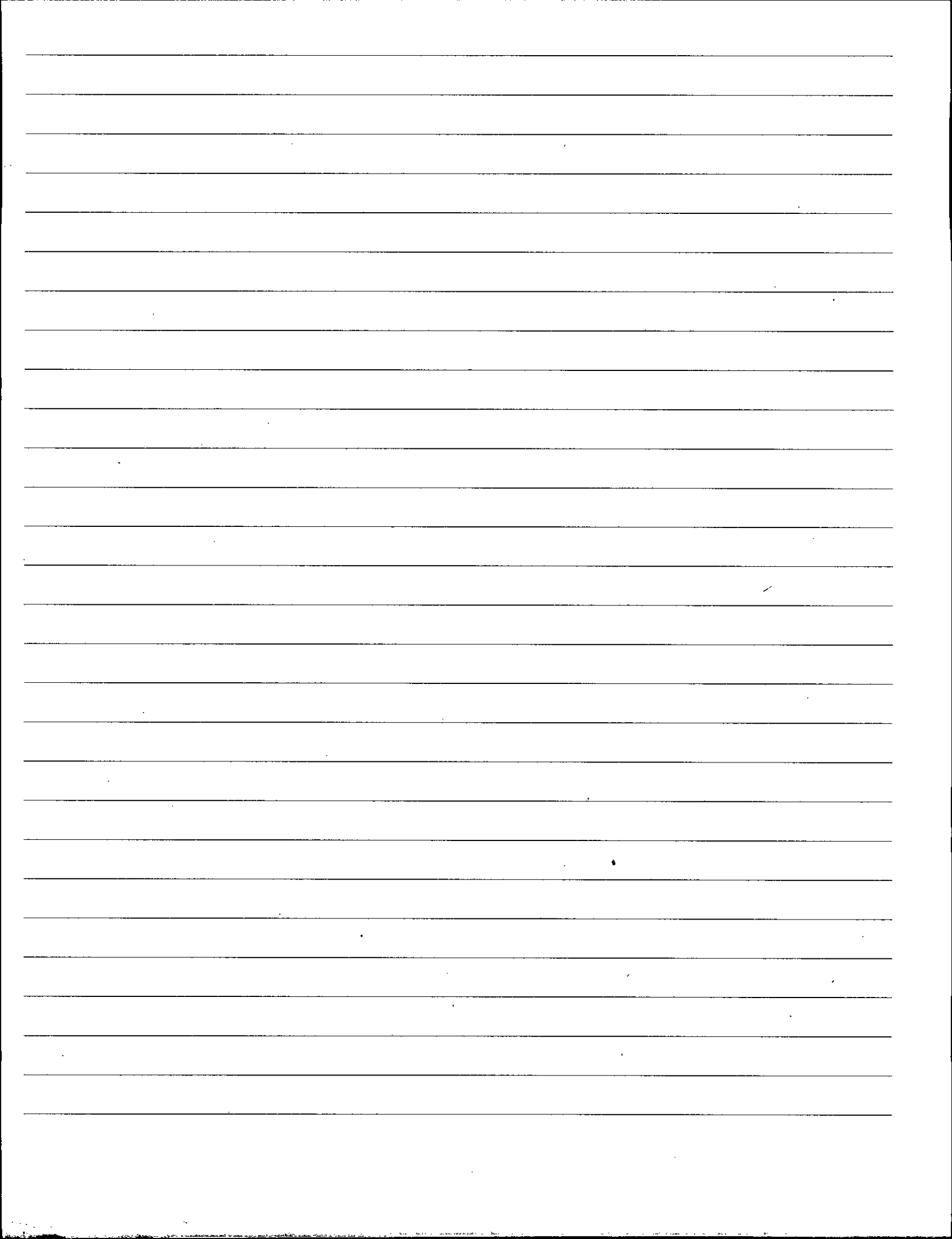
authorized on the grounds that it "does not appear

to have been "presented" in the proper court as

required by law." This indictments and Count, does

not have language that all these other indictments





have "That it was further Presented in to said

Court". See Exhibits

(i.e. does the and Court track any offense under Texas

law? ~~Both~~ If it is, then it should of remained

The same in Court's jury charge. The 6th

Amendment gives every defendant "The right... to

be informed of the nature and Cause of the accusation"

7.) Did the language in Court Charge Not broaden

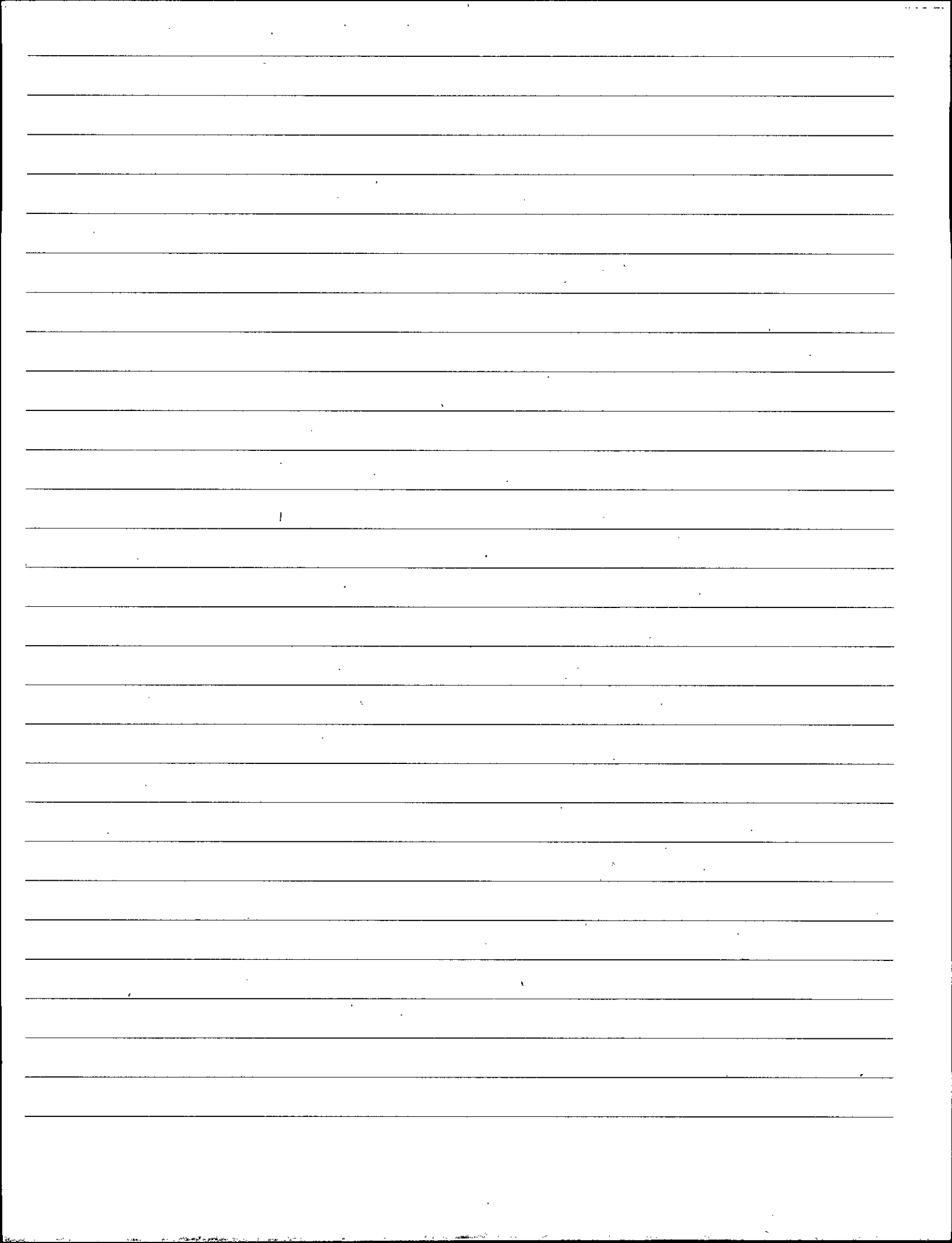
what was actually alleged in original indictment.

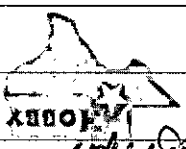
indictment? The indictment alleged 1 thing,

paragraph 1 of the Court's charge added "That in

Committing the offense" and changed all the "And's"

to "or" paragraph 2 stated if you find the





defendant guilty of "evading arrest" you must

determine whether or not I used or "exhibited

the deadly weapon. "During the commission of

the offense" They were instructed that I had to

be found guilty of evading arrest. They were not

instructed how the vehicle became a deadly weapon,

The 2nd part of allegation in indictment was

abandoned: "That in the manner of its use "And"

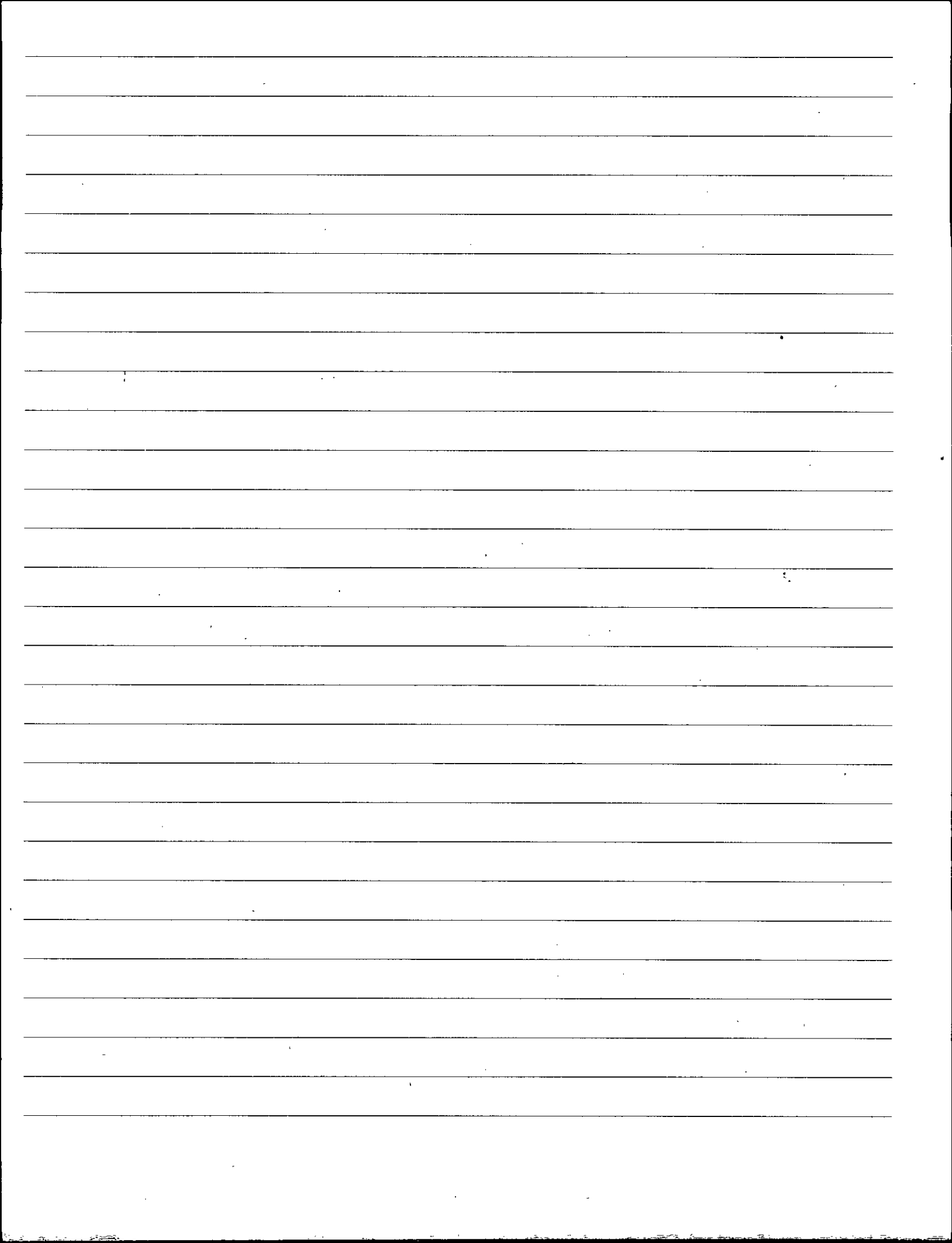
"intended use" was capable of causing death

"and" serious bodily injury. "The state said it does

not have to prove intent. Are the states not

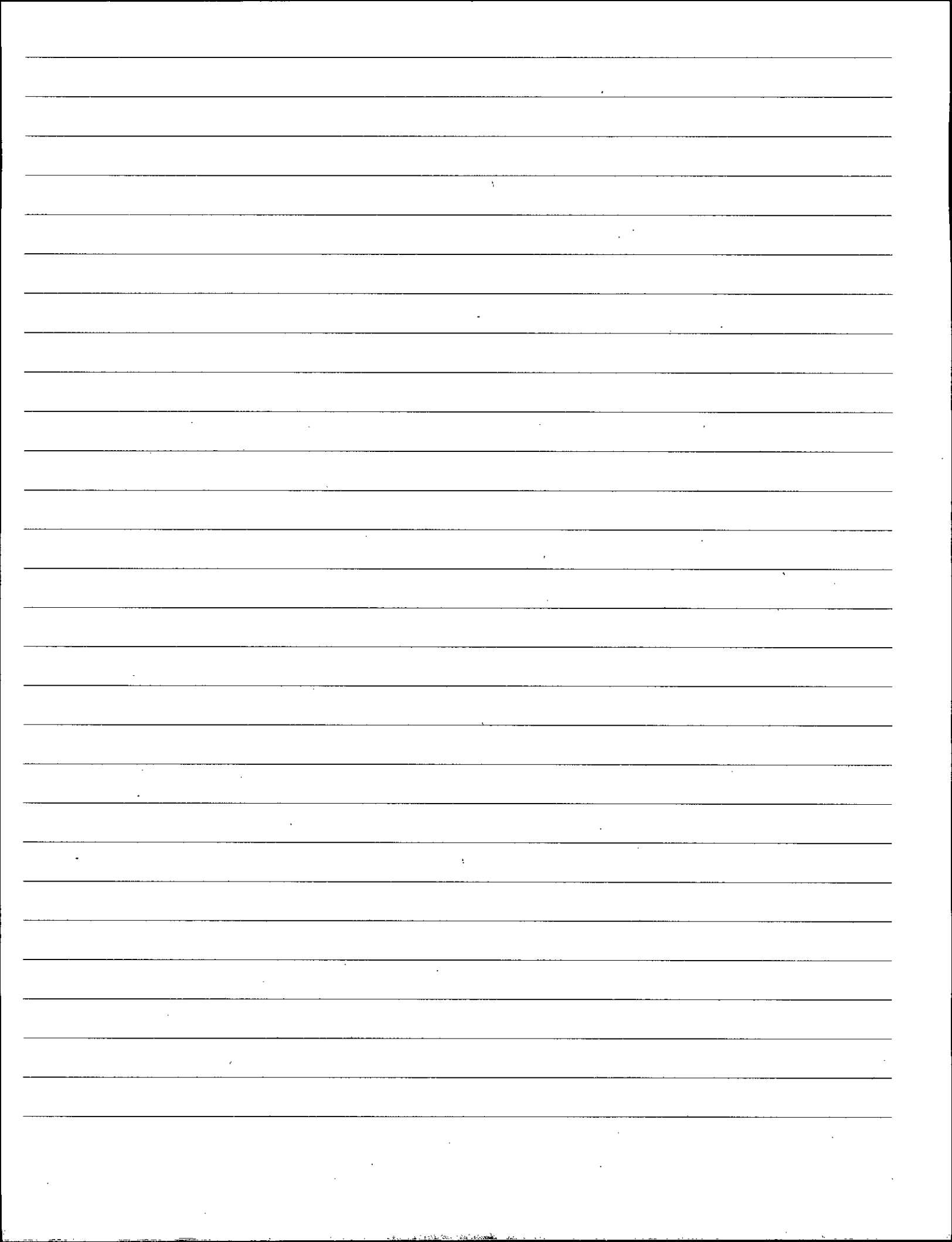
bound by what was alleged? paragraph 7 of

the special issue which is the Application paragraph.





Allowed the jury to make this affirmative
 finding on a theory or an offense that was
 not alleged in the indictment. The theory in
 the indictment alleged one thing, and the
 theory for which I was convicted alleged
 something else. Paragraph 7 alleges in part:
~~the defendant used or exhibited a deadly~~
~~weapon, to-wit: a Motor Vehicle, during the~~
~~Commission of the offense for which he has~~
 been convicted. The State is under the impression
 that it alleged the offense in the indictment in
 the conjunctive, "and" and proved one of thier
 theorys in the disjunctive, "or." That is not



"Serious bodily injury, was incorrectly defined.

a and both have the same meanings here.

have been defined for you in numbered paragraph

State That "Deadly Weapon" and "Serious Bodily Injury

abandoned. The 3rd Paragraph of Counts Charge

2nd Part of The deadly weapon (Vehicle) was

reasonable doubt as well. In this case the

the State has to prove that beyond a

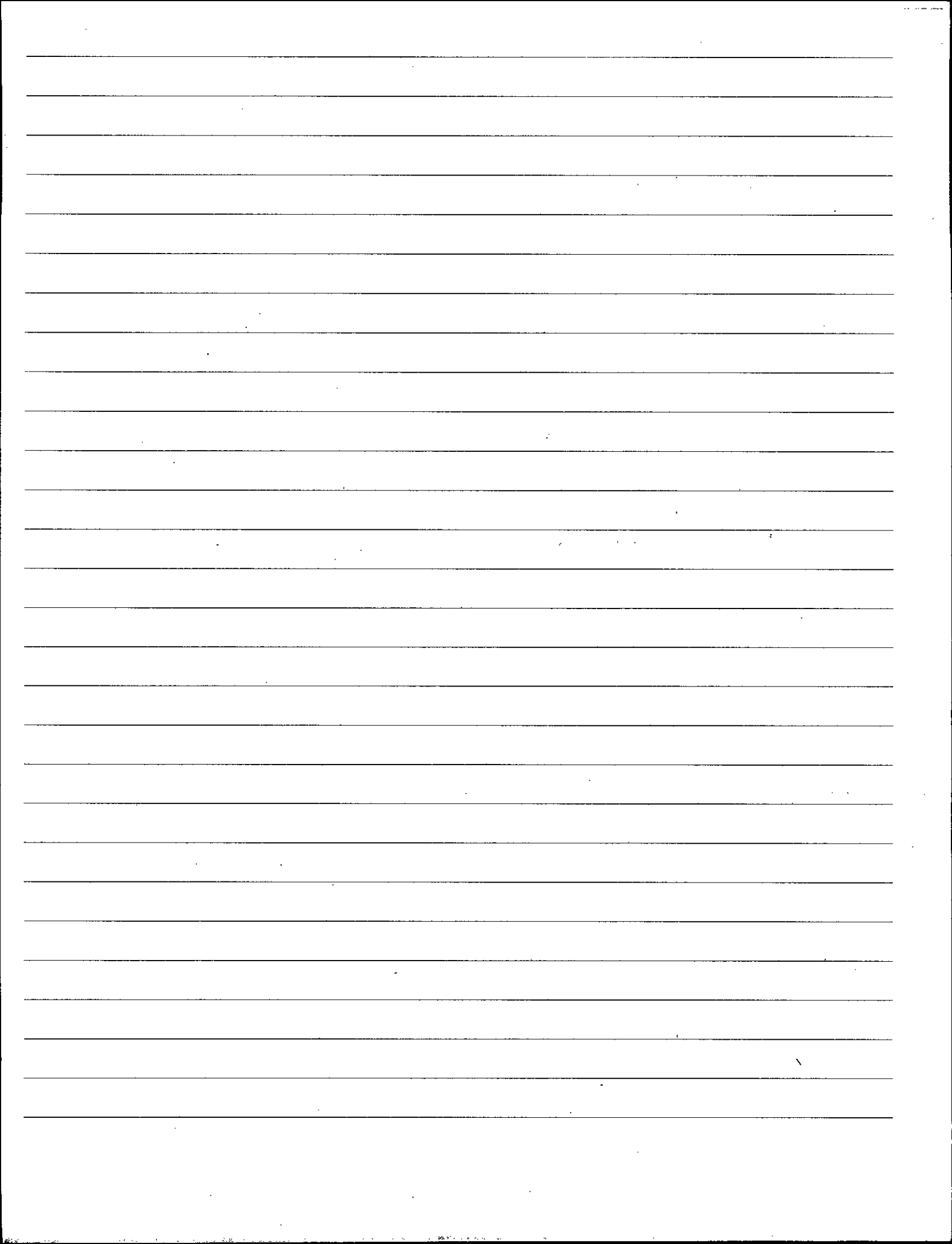
the vehicle becomes a deadly weapon, and

however - There has to be a manner how

arrest offense See Penal Code 38.01(b)(3)(a)(a).

weapon is Not an element of the evading

what happen in this case. The deadly



how could those a definitions have the

Same meaning and I was incorrectly defined?

This case is just like *Stirone v. U.S.*

361 U.S. 212, 217-219 (1960). There the defend-

ant was indicted for obstructing the interstate

movement of sand in violation of the Hobbs

act, 18 U.S.C. § 1951. The district court had allowed

a conviction based on a factual finding that the

defendant had obstructed a shipment of steel in

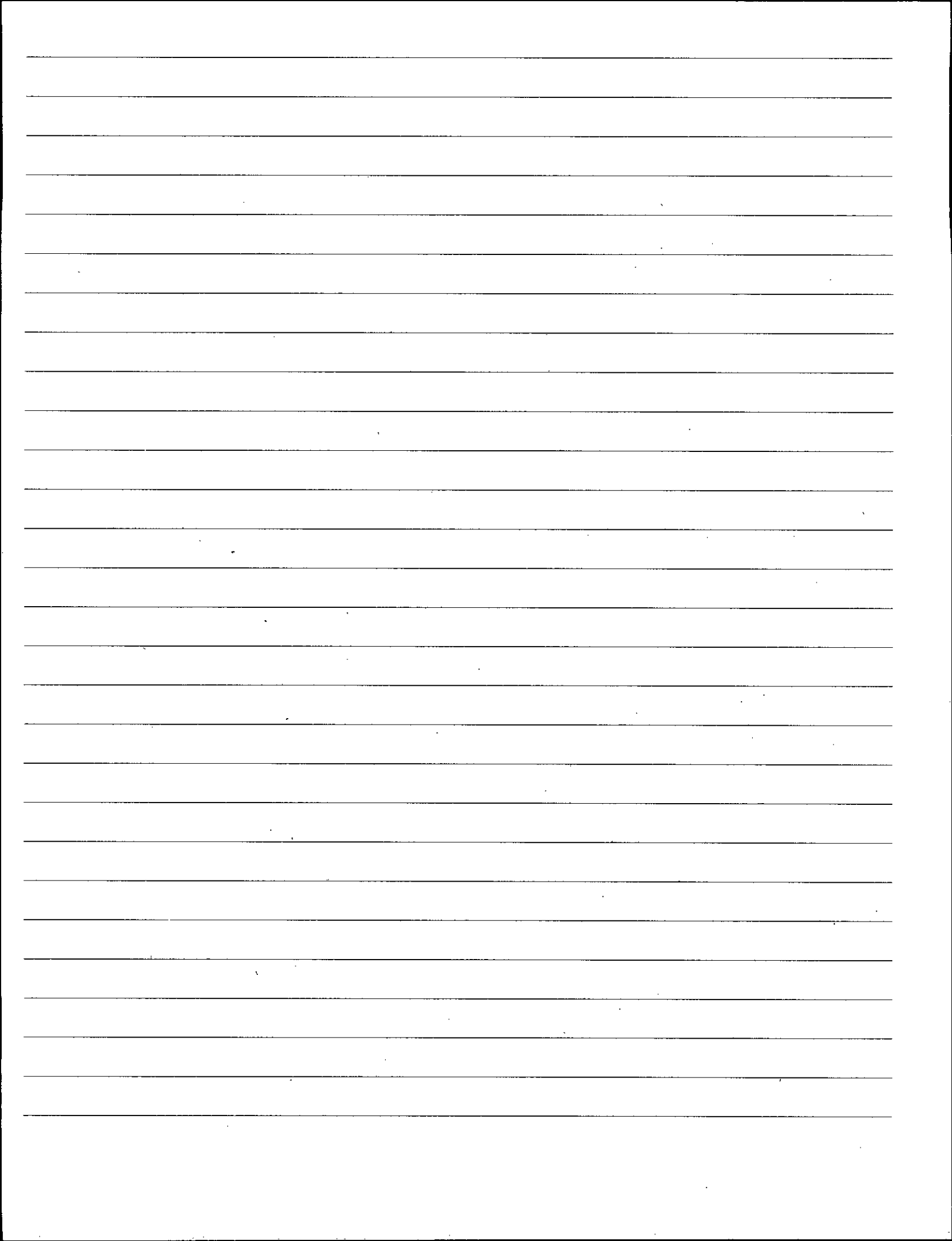
interstate commerce. The court reversed and held

that the variation between the jury instructions and

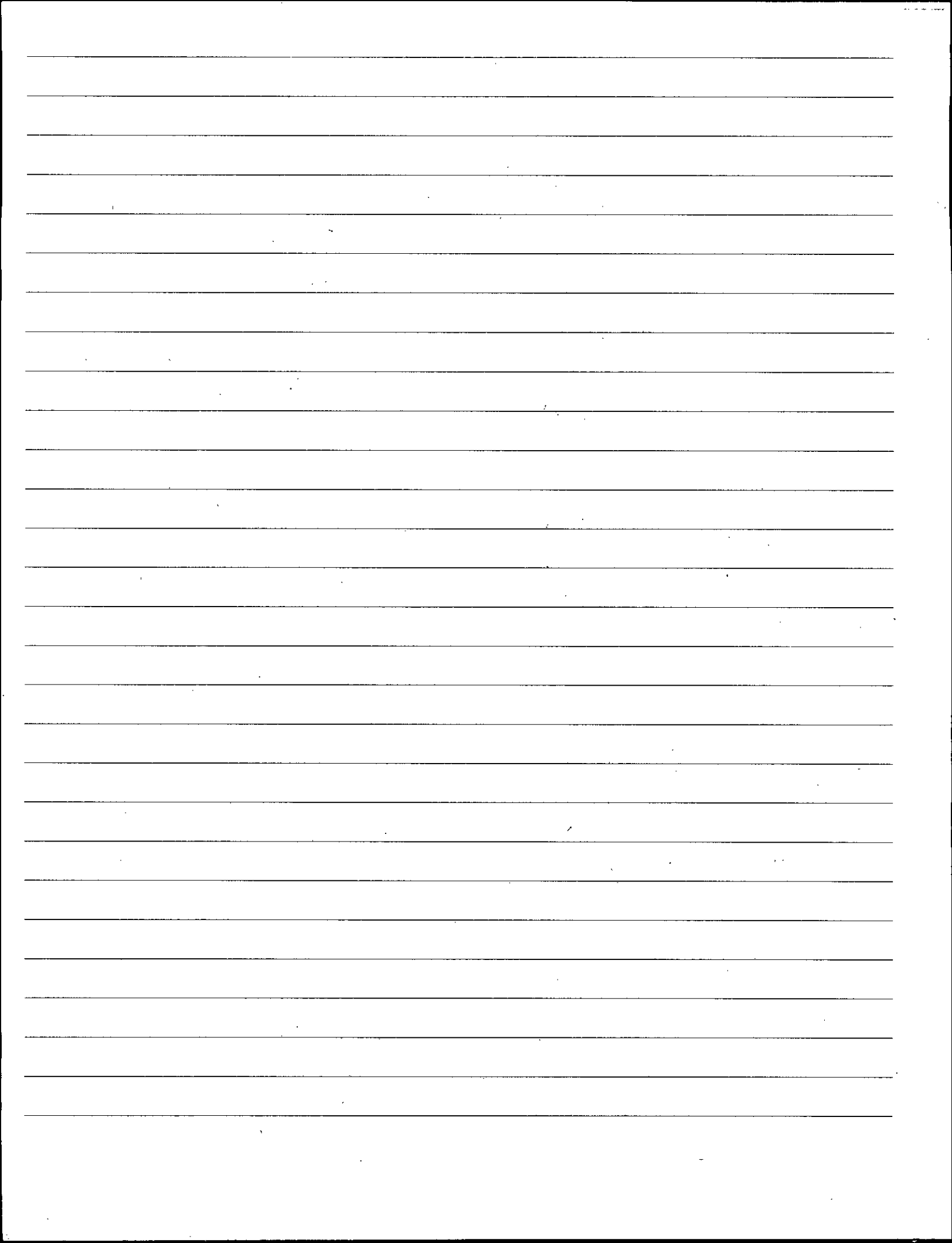
the indictment "DESTROYED" the defendants

substantial rights to be tried only on charges





presented in an indictment returned by the grand jury. In this case the trial court allowed the prosecution to amend what the indictment alleged, it allowed the prosecution to join a misjoined offense, and to enter an affirmative finding to be entered in a judgment, (See Tex. Code Crim. Proc. art. 42.01(a)) 2013, states in part that: affirmative findings entered pursuant to Subdivision (a) of Section 39 of art 42.12 of this code) that Texas Penal Code 12.35(c)(1) provision does not state that if that finding is made that it shall be entered in the judgment. It clearly



States that if the finding is made...

Then the State Jail Felons will be punished

as a 3rd degree. art. 42.12.33 (a)(a) has

this language "On an affirmative finding under

this subdivision, the trial court "shall" enter

the finding in the judgment of the court." art.

42.01 (a1) 2013.

8) was I under arrest the exact minute

That officer pulled in behind me? Both officers

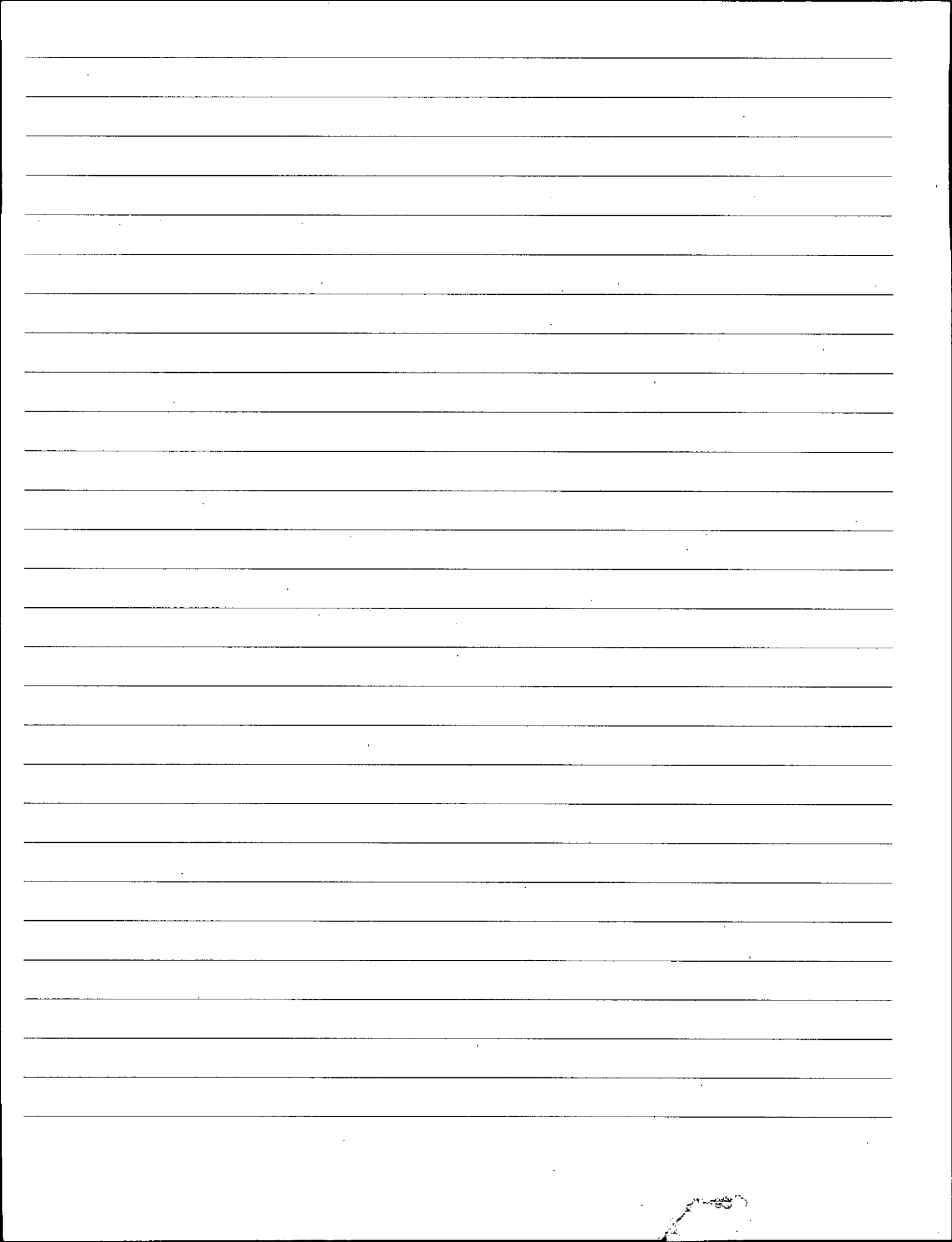
stated they did not have a warrant, nor probable

cause to arrest me. However I was convicted

for evading arrest in a vehicle without a

conviction of any other crime that caused the arrest





I was not convicted for evading "arrest or

detention," nor for evading detention. The Statute

has the "or" in between arrest and detain. Two

different theories or manner or means. In my

situation - The States Theory was that I evaded

arrest. See Reporter Records pgs 35, and 80 where both

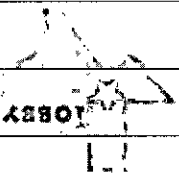
officers testified that I was not yet under arrest.

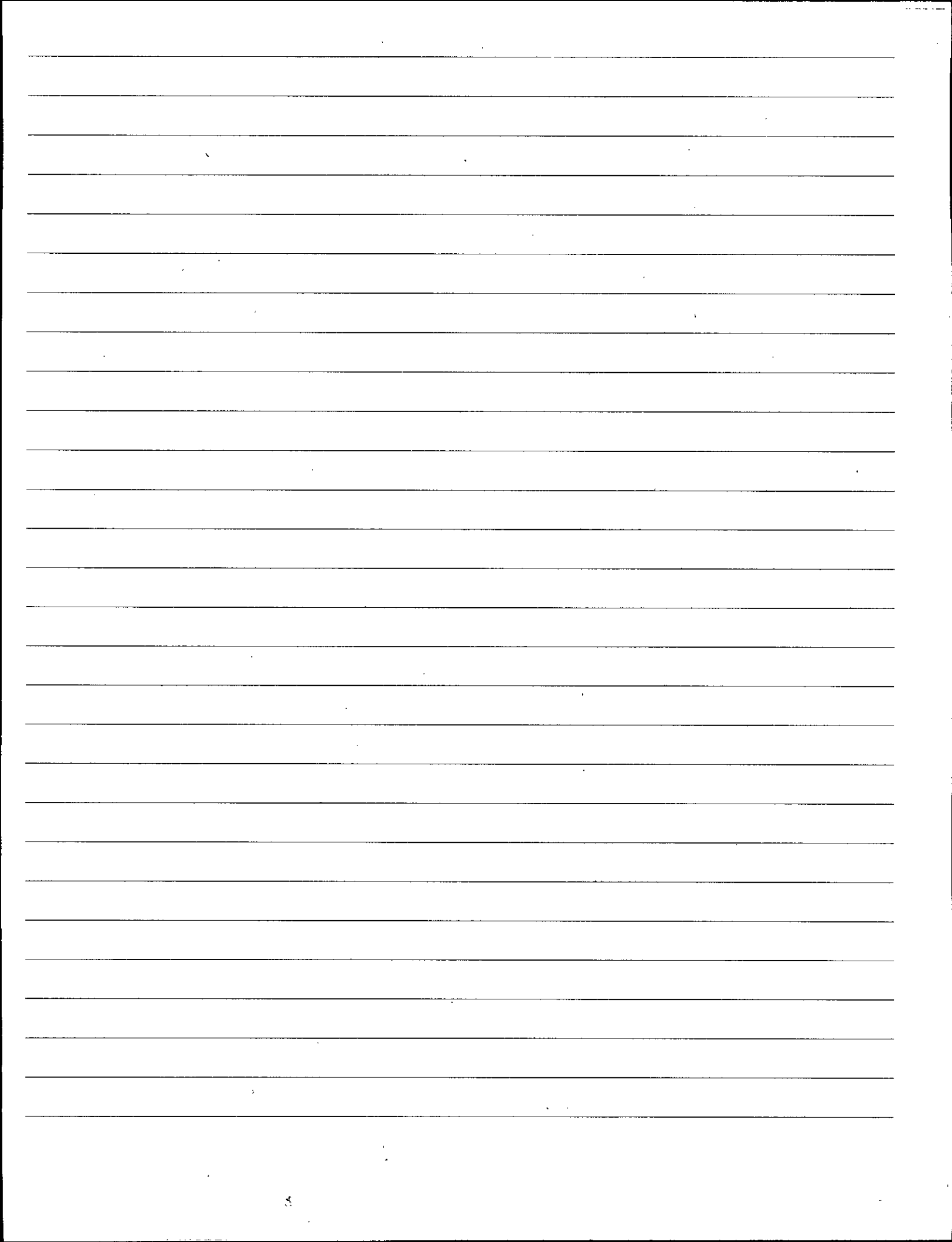
Nor was probable cause established. I had not been

taken into custody nor had I submitted to

the Police officer's authority. See California v.

Hadari D. 499 U.S. 621 (1991)





REASONS FOR GRANTING THE PETITION

This petition should be granted for the following reasons:

If and Count could of been proved as alleged in the indictment - The State would of Incorporated word for word in the counts charge what ^{the} official indictment alleged - It could of tried to prove one of there theories. The trial Court allowed the State to Constructively Amend Count 2 of Indictment in Violation of 5th & 6th United States Constitutional Amendments, and articles 28.10 and 28.11 of the Texas Court of Criminal Appeals. The State admitted to Amending ~~indicted~~ indictment in there facts finding and conclusion of law. However the state believes that the indictment was plead in the conjunctive and proved in the disjunctive - That is Not the case. If this indictment was Not amended Then and Count is Not an offense Period - State or Fed. Nor does it qualify to be an indictment.

This Petition should also be granted and in the Alternative delete the deadly weapon finding because as alleged there is no Association felons between deadly weapon allegation, and evading arrest, that was made without a warrant and without probable Cause. This Petition should be granted because I was convicted of a crime that was not the Subject of My Indictment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Amador Rodriguez

Date: _____

