No. 24-

IN THE

Supreme Court of the United States

ZACKERY TERRELL,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the denial of the Applicant's Suggestion of Reconsideration violates the Eighth Amendment protection against cruel and unusual punishment in conflict with this Court's ruling in Harmelin.

II. Whether the denial of the Applicant's Suggestion of Reconsideration violates the Sixth Amendment protection against ineffective assistance of counsel in conflict with this Court's ruling in Strickland.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Zackery Terrell.

The State of Texas.

LIST OF PROCEEDINGS

COURT OF CRIMINAL APPEALS OF TEXAS
Case No. 67366-CR-A
EX PARTE ZACKERY TERRELL
Notice without written order of denial of Petitioners Request for Reconsideration dated October 25, 2024.

COURT OF CRIMINAL APPEALS OF TEXAS
Case No. 67366-CR-A
EX PARTE ZACKERY TERRELL
Notice without written order of denial of application for writ of habeas corpus dated September 18, 2024.

149TH DISTRICT COURT OF
BRAZORIA COUNTY TEXAS
Case No.67366-A
EX PARTE ZACKERY TERRELL
Order denying Application for Writ of Habeas Corpus. dated May 22, 2024

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Zackery Terrell respectfully requests that a Writ of Certiorari be issued to review the denial of relief from the Court of Criminal Appeals of Texas.

OPINIONS BELOW

- The October 25, 2024, notice without written order of denial of request for reconsideration, Court of Criminal Appeals of Texas, is produced in the Appendix ("Appendix 23a").

- The September 18, 2024, Notice without Written Order of denial of application for writ of habeas corpus, Court of Criminal Appeals of Texas, is produced in the Appendix ("Appendix 1a").

BASIS FOR JURISDICTION IN THIS CASE

The Court of Criminal Appeals of Texas issued its decision on October 25, 2024. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

> process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const. Amend. VI.

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. Amend. VIII.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Petitioner Zackary Terrell ("Mr. Terrell or Petitioner") brought the above-captioned appeal following the denial of Mr. Terrell's Writ of Habeas Corpus Petition. The lower court should not have denied the writ of habeas corpus as there was a clear violation of Mr. Terrell's Eighth Amendment rights. Mr. Terrell followed all necessary procedures and exhausted all lower court remedies before promptly filing.

On February 2, 2012, Petitioner was giving a ride home to his cousin, Lee Turner ("Turner"), when he stopped at a convenience store. Officer Carlos Meraz ("Meraz") discovered the expired registration on a black Nissan Armada and observed Terrell go into the store and exit with a white bag that was placed in the backseat on the driver's side before going into the Nissan. Meraz stopped the Nissan at a Sonic restaurant and approached Terrell who was in the driver's seat. Meraz did not observe any suspicious activity or furtive movements when he approached Petitioner. and never saw Terrell reach towards the passenger side or center console.

At the time Mereaz asked Terrell to step out of the vehicle, Officer Wortman ("Wortman") was already at the scene. Meraz testified that he radioed for Wortman and checked the identifying information from Turner at the same time. More than ten minutes passed between the time Meraz went back to his patrol vehicle and when he approached the Nissan again. Terrell was arrested for driving with an invalid driver's license, and no insurance. No drugs or weapons were found on Terrell. Terrell was calm prior to being placed in the patrol vehicle. Turner was also arrested for an outstanding warrant and placed in Wortman's police car. The Nissan was towed, and an inventory was conducted, where Wortman found two Pyrex containers and a whisk inside a yellow Fiesta bag underneath the passenger seat with cocaine residue and sandwich bags on the passenger side floorboard.

The alleged controlled substance, for which Terrell was convicted on, was the residue from the Pyrex containers underneath the passenger seat. Officer Herbert Oubre had to scrape the residue out of the container with a pocketknife to collect it at the station because it was dried

to the sides, as it was not identifiable what was in the bag from the outside.

Meraz, a three-year police officer with the Pearland Police Department, testified that he had no training in drugs or drug analysis. A semiautomatic gun was found between the passenger seat and the center console of a patrol vehicle. Meraz testified that when he made contact with Turner, at the time he went up to the passenger side door, Turner has his hands wedged in between his seat and the center console where the firearm was later found and was making furtive movements Turner appeared startled when Meraz approached, indicating that he did not feel he was being watched. Over $12,000 in cash was found in the vehicle, with Terrell confirming it was his from his barber/beauty business. Terrell could not hear what was going on outside the patrol vehicle while he was in the backseat of the patrol vehicle. Even 22 minutes into the video Terrell was calm. Terrell made recorded statements in the back of the police car where he tells himself he "F'd up". When told he was being charged with possession, Terrell appeared surprised and denied possession.

Turner was searched at the jail, and a scale was found in his shoe. A baby bottle was found in the passenger door where Turner was sitting, that you would not be able to see with the door closed. A Big Red soda bottle was found in the center console and a cup of ice. Wortman testified they smelled like cough syrup. The Big Red Bottle and the baby bottle were field tested, and only revealing they were solid substance, no results were obtained. The items were submitted to the Brazoria County Crime Laboratory. Meraz testified that it is illegal just to carry a certain amount of cash on you, but he could not state what penal code section states that or what amount of money is illegal

to carry on you. Meraz claimed the weapon was linked to the passenger, as evidenced by his hands wedged in the area. Detective David Vlasek ("Vlasek") testified that the firearm was destroyed before the trial began, along with the magazines and bullets. Vlasek also testified the firearm was sent for ballistics testing, but he could not testify to the results.

Meraz was not constantly watching Turner at the scene. Wortman testified that he was at the back portion of the vehicle trying to maintain a visual of both Turner and Meraz, splitting his attention between the two. The Nissan had a dark tint on it. Wortman did not see Turner placing the scale in his shoe that was later discovered when he was searched at the jail. A presumptive test was conducted on the scale which tested positive for cocaine. However, no laboratory testing was conducted on the scale.

The procedural history is as follows:

- In 2012, the Petitioner was charged with Possession of a Controlled Substance less than 1 gram.

- The case proceeded to a jury trial, where the jury found the Petitioner guilty and found him to have used or exhibited a deadly weapon during the offense. On March 28, 2013, the judge assessed the indictment's habitual-felon enhancement true and sentenced him to 50 years in prison. The Petitioner was represented by attorney Arthur Washington.[1]

1. The imposition of aggravated habitual offender status is not supported by the facts or relevant Texas law.

- On August 16, 2016, The First Court of Appeals affirmed the trial court's judgment.

- On May 22, 2024, an Order denying Mr. Terrell's Application for Writ of Habeas Corpus was filed by the 149th District Court of Brazoria County Texas. (App. Writ of Habeas Corpus).

- On July 16, 2024, Mr. Terrell filed a Writ of Habeas Corpus with the Court of Criminal Appeals for Texas. On September 18, 2024, the Court of Criminal Appeals for Texas denied Mr. Terrell's petition without a written order. (Ct. Crim. App. Writ).

- On September 26, 2024, Mr. Terrell filed a Suggestion to Reconsider on the Court's Own Motion. On October 25, 2024, the Court of Criminal Appeals for Texas, denied Mr. Terrell's request to reconsider.

REASONS TO GRANT THIS PETITION

This Court should reverse the lower courts and remand with instructions to grant relief because Mr. Terrell's sentence is in violation of the Eighth Amendment to the United States Constitution.

I. THE DENIAL OF MR. TERRELL'S WRIT OF HABEAS CORPUS PETITION AT THE STATE LEVEL VIOLATES THE EIGHT AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Eighth Amendment provides "excessive bail shall not be required, nor excessive fine imposed, nor

cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. The Eighth Amendment's prohibition of cruel and unusual punishments has been held to apply to the states by application of the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. Amends. VIII, XIV; *Robinson v. California*, 370 U.S. 660, 675 (1962). Generally, if a sentence is "within the statutory limits, including punishment enhanced pursuant to a habitual-offender statute, [it] is not excessive, cruel, or unusual." *State v. Simpson*, 448 S.W.3d 318, 323 (Tex. Crim. App. 2016). This Court has found there is a narrow exception to this rule in that the Eighth Amendment prohibits noncapital punishment within statutory limits if the sentence is grossly disproportionate to the offense. *Graham v. Florida*, 560 U.S. 48, 59-60 (2010); *Harmelin v. Michigan*, 501 U.S. 957, 997-1001 (1991).

To determine whether a punishment is cruel and unusual, this Court must look beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Eighth Amendment prohibits the imposition of inherently barbaric punishments under all circumstances. See, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002). This Court precedents consider punishments challenged as disproportionate to the crime.

A. MR. TERRELL'S SENTENCE IS GROSSLY DISPROPORTIONATE TO THE CRIME COMMITTED.

The Eighth Amendment, provides that the ban on cruel and unusual punishments is the "precept of

justice that punishment for crime should be graduated and proportioned to the offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). This Court considers all the circumstances of the case to determine whether the sentence is unconstitutionally excessive and disproportionate. This Court has found that the Eighth Amendment contains a "narrow proportionality principle," that "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime. *Harmelin.* 501 U.S. at 997.

In determining whether a sentence for a term of years is grossly disproportionate for a particular crime, the court must compare the gravity of the offense and the severity of the sentence. *Id.* at 1005. In cases in which the threshold is met and leads to an interference of gross disproportionality, the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. *Id.* Should the comparative analysis of this validate an initial judgement that the sentence is grossly disproportionate, the sentence is cruel and unusual. *Id.*

i. THE GRAVITY OF THE OFFENSE VERSUS THE SEVERITY OF THE SENTENCE.

To determine the gravity of the offense, verse the severity of the sentence, this Court has considered numerous factors, to determine culpability such as the defendant's motive and intent to commit the crime, the defendant's role as the primary actor or as a party to

the offense, and his acceptance of responsibility, prior adjudicated and unadjudicated crimes, and harm caused or threatened to the victim and to society. *See*, *e.g.*, *Solem v, Helm*, 463 U.S. 277, 293-94 (1983); *Graham*, 560 U.S. at 48.; *Harmelin*, 501 U.S. 957; *Ewing v. California*, 538 U.S. 11 (2003).

Here, when looking to the factors that are typically used to indicate the gravity of the offense verses the severity of the sentence, they clearly show that the sentence was grossly disproportionate in violation of the Eighth Amendment.

First, for the Petitioner's motive and intent to commit the crime, there is none that can be shown. There was no motive or intent to possess the cocaine of less than a gram in which he was charged for. The Petitioner was just the driver of the vehicle at the time in which they were pulled over by the police. Moreover, the gun in which was used to enhance the sentence was not associated with the Petitioner but rather belonged and associated with the passenger of the vehicle. Similarly, the cocaine, which was found and used to charge the Petitioner, was under the seat of the passenger, it was not near the Petitioner. The Petitioner had no intention to commit any crime involving the cocaine as it was not in his view or possession, but rather, it was in the vehicle. While the Petitioner was the driver of the vehicle, he did not own the vehicle or have knowledge of all the contents of the vehicle.

Second, as for the Petitioner's role as the primary actor or as a party to the offense, the Petitioner was neither. The passenger in the car was rather the primary actor or party to the offense. The gun, a .45 caliber,

semiautomatic, which was found in the center counsel, was associated with Lee Turner, rather than the Petitioner. There was no drugs or weapons found on the Petitioner. Rather, the alleged cocaine found, through the residue from the Pyrex dishes underneath the passenger seat in which, Turner was sitting in, had to be scraped out with a pocketknife to know of the substance engrained in the dish. The only individual within the vehicle having any connection to the alleged cocaine found was Turner, upon arrival at the jail, there was a scale found in the show of Turner. The scale was then tested in which it tested positive for cocaine. All evidence provided in connection to the alleged cocaine was not found at the time in which the Petitioner was arrested, or when he was driving the vehicle. Rather, was only found after the car was towed and taken into custody by the police. The Petitioner was not connected to the alleged cocaine through the evidence provided.

Third, as for acceptance of responsibility, the Petitioner acted in the appropriate manner at the time of the stop and arrest. At the time in which the police stopped the vehicle, the Petitioner pulled over in a timely and orderly manner and abided by the police's statements and requirements at the stop. The Petitioner while being pulled over for driving a vehicle for an expired license plate, displayed no furtive movements at the time of the stop. Moreover, it was testified that the Petitioner was calm during the entire incident. While there was plea offers made available to the Petitioner prior to trial, the trial counsel representing the Petitioner failed to adequately describe the correct sentencing structure to the Petitioner. The Petitioner when denying the plea offer of seven years thought he was facing two to ten years in prison, and whether he received seven years or ten years

they would likely result in the same parole date. At the time the Petitioner was advised on the range or two to twenty years, the Petitioner did not believe he had the option to accept the offer, due to a statement made by the trial judge. Had the Petitioner known the offer was still available, he would have accepted. Moreover, had the Petitioner known that the enhancement of with a deadly weapon requires serving half of the sentence in prison prior to eligibility of parole, the Petitioner would have accepted the plea offer.

Fourth, as for previously adjudicated and unadjudicated crimes, there is two in which the State introduced before the trial judge's consideration. First, on November 4, 1991, the Petitioner was placed on deferred adjudication in the 183rd Judicial District Court of Harris County in Cause No. 604690 for the third-degree felony offense of aggravated assault, for an offense that occurred on July 24, 1991, when Petitioner was 17 years old. He was adjudicated on May 22, 1994, and was sentenced to serve two years in prison. Second, on June 29, 1999, the Petitioner was convicted in the 183rd Judicial District Court of Harris County of two offenses allegedly occurring on February 16, 1999, for possession with intent to deliver a controlled substance, more than one gram and less than 4 grams in Cause No. 816406 for which he was sentenced to 16 years in prison, and delivery of a controlled substance, less than one gram in cause no. 805537, for which he was sentenced to term of 6 years in prison. Both crimes occurred 12 years prior to time in which the Petitioner was incorrectly convicted of the crimes in which he was charged.

Lastly, as for the harm caused or threatened to the victim and to society, there is none. At trial there was

no testimony or evidence of any specific harm caused to society for the crime in which the Petitioner allegedly committed of possession of less than a gram of cocaine. There was no crime allegedly committed in which causes harm, involves a victim, or threatens society in any way.

Therefore, each of these commonly used factors individually and viewed provide that the gravity of the harm verses the severity of the sentence are disproportionate. The crime allegedly committed here, has no harm caused. The Petitioner has no moral culpability, had no motive and intent to commit the crime, was not a primary actor of a party to the offense, the Petitioner respectfully complied with the traffic stop and directions of the police, his prior adjudicated and unadjudicated crimes while relevant occurred over 12 years prior to this alleged event, and the alleged crime had no harm caused nor did it threaten a victim and/or society. Thus, the gravity of the harm was extremely disproportionate the severity of the sentence.

ii. COMPARISON OF THE PETITIONER'S SENTENCE VERSUS SENTENCES OF SIMILAR OFFENSES IN THE SAME JURISDICTION.

In cases, in which, a Petitioner can show that the gravity of the offense is disproportionate to the severity of the sentence, the next inquiry requires the comparison of the Petitioner's sentence with the sentences received by other offenders in the same jurisdiction. *Harmelin*, 501 U.S. at 1005. *See Solem*, 463 U.S. at 296-300.

In comparing the sentence of the Petitioner to those within the same jurisdiction of Brazoria County, Texas

there is numerous instances on comparison.

First, on March 9, 2023, Jillian Jinkins was charged with Possession of a Controlled Substance, less than 1 gram of methamphetamine in Case No. 97761-CR. Her charge was enhanced to a third degree with prior convictions in 2007 and 2015, she entered into a plea agreement and was convicted and sentenced to three years community service. In 2024, after a Petition for Revocation of Probated Sentence was filed, her probation was revoked, and she was sentenced to six-year imprisonment.

Second, on September 16, 2021, Steven Smith was charged with Possession of a Controlled Substance enhanced as a habitual offender in Case No. 93636-CR in Brazoria County, Texas. On April 22, 2022, he was convicted, the State waived all his enhancements except for one, and he was sentenced to 5 years in prison.

Third, on October 22, 2020, Daniel Claxton was charged with Possession of a Controlled Substance – Enhanced, in Case No. 91143-CR in Brazoria County, Texas. He was placed on a 4-year deferred adjudication community supervision. A Motion to Adjudicate was filed alleging that while on community service, among other alleged violations, he possessed 1 to 4 grams of methamphetamine, possessed under two ounces of marijuana, and caused bodily injury to a family member by hitting a family member's head on a cabinet, used methamphetamine and marijuana while on supervision. On March 13, 2023, he pleaded true to the allegations, and a judgment adjudicating guilt was issued and he was sentenced to 2 years in prison.

Fourth, On January 29, 2013, David Alaniz was charged with Possession of a Controlled Substance, less than 1 gram of cocaine, in Cause No. 1371602. David Alaniz's Indictment. He was convicted on February 6, 2013, and received 180 days in a State Jail Facility.

Fifth, On December 27, 2012, Alesia Kerley was charged with Possession of a Controlled Substance, less than 1 gram of cocaine in Cause No. 1372268 in Harris County, Texas. On December 28, 2012, she was convicted and received 75 days in county jail.

Sixth, On December 19, 2012, Pedro Millan-Diaz was charged with Possession of a Controlled Substance, less than 1 gram of cocaine in Cause No. 1371599 in Harris County, Texas. On December 20, 2012, he was convicted and received 60 days in jail on December 20, 2012.

Seventh, On December 18, 2012, Michael Sanchez was charged with Possession of a Controlled Substance, less than 1 gram of cocaine, in Cause No. 1371524 in Harris County, Texas. On January 18, 2013, the Court placed him on a two-year deferred adjudication community supervision. On April 3, 2014, his community supervision was early terminated.

The above stated cases provide numerous instances in which individuals who were convicted on the same crime received lesser sentences. Moreover, individuals who received enhancements such as Jillian Jenkins, although, Ms. Jenkins took a plea deal, the sentence in which she received when her probation was revoked is disproportionate when comparing to the Petitioner for crime which was enhanced to a third degree.

In comparison to the case of the Petitioner, who received a sentence of 50 years for possession of less than a gram of cocaine, is disproportionate to that of those who received sentences of the same crime. The Petitioner was found with a total of 0.5590 grams of cocaine, which was found through residue that had to be scaped with a pocketknife from containers found under the passenger seat. This cocaine was found not prior to the arrest of the Petitioner, but rather after the car was towed and inventory was conducted. The Petitioner, whose sentence was enhanced to a third degree in comparison to those like him, the sentence received was greatly disproportionate. As provided above, the highest sentence included a third-degree enhancement was six years imprisonment with the shortest sentence, although not for a third-degree enhancement was for 60 days imprisonment. Clearly displaying that the Petitioner's sentence of 50 years for a third-degree enhancement was greatly disproportionate in violation of the Eighth Amendment of the United States Constitution.

Therefore, the gravity of the offense is disproportionate to the offense, and sentences of those in the same jurisdiction is disproportionate to the at of the Petitioner. Thus, the Petitioners sentence is grossly disproportionate in violation of the Eighth Amendment of the United States Constitution. As such, this Court should accept the Petitioner's application to hear and decide on the matter as the Petitioner's sentence is in violation of the Eighth Amendment.

II. EVEN IF THIS COURT FINDS THE PETITIONER'S SENTENCE WAS IN VIOLATION OF THE EIGHTH AMENDMENT, THE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL PROTECTIONS UNDER THE SIXTH AMENDMENT AND CONTRADICTORY TO THIS COURT'S RULING IN *STRICKLAND V. WASHINGTON.*

Criminal Defendants are guaranteed the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); U.S. Const. amend. VI; *See also* Tex. Const. art. I §10. In Strickland, the Supreme Court set forth a two-part test for analyzing claims of ineffective assistance of counsel, as provided through the Sixth Amendment of the United States Constitution, which has been incorporated to apply to the states via the Fourteenth Amendment. *Strickland*, 466 U.S. 668 (1984).; *See Wiggins v. Smith*, 539 U.S. 510 (2003); *See Also United States v. Cronic*, 466 U.S. 648 (1984). Courts considering ineffective assistance of counsel must evaluate whether the counsel's deficient performance was significant enough to undermine confidence in the results of the proceedings. *Bell v. Cone*, 533 U.S. 685, 695 (2002). In order to succeed in an ineffective assistance of counsel claim, the defendant must show that the misrepresentation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 680.

To establish ineffective assistance of counsel, the appellant must demonstrate that: (1) the counsel's performance fell below an objectively reasonable standard of performance and (2) that this deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 688, 694.

According to *Strickland*, the defendant must first show that counsel's performance was deficient. This requires showing that the counsel made errors so seriously that the counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, under the *Strickland* test, the defendant must show that the counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *Strickland* requires that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Id.* at 690. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

In assessing deficient performance, courts must determine whether there is a gap between what counsel did and what a reasonable attorney would have done under the circumstances. *Strickland, supra*, at 690. A criminal defendant's Sixth Amendment right to effective assistance of counsel extends to all critical stages of trial, including the plea-bargaining process and guilt-innocence stage of both capital and non-capital trials. *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (holding *Strickland* applies to plea bargaining stage); *Craig v. State*, 825 S.W.2d 128, 129 (Tex. Crim. App. 1992 (holding *Strickland* applies to the guilt-innocence stage of both capital and non-capital trials); *Lafler v. Cooper*, 566 U.S. 156 (2012).

Counsel's strategic choices and the advice given to a criminal defendant must be based on a reasonable investigation of the relevant facts and law. *Strickland*, 466 U.S. at 690-91. Counsel has "a duty to provide advice to his

client about what plea to enter, and that advice should be informed by an adequate investigation of the facts of the case or be based on a reasonable decision that investigation was unnecessary." *Ex parte Harrington*, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010). Ineffective assistance of counsel has been found in cases in which an attorney has failed to inform his client of a plea bargain offer when the defendant can provide that failing to provide such information prejudiced the defense. *Ex parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987); *Martinez v. State*, 74 S.W.3d 19 (Tex. Crim. App. 2002).

To prove prejudice, an appellant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the proceeding results would have been different. *Strickland*, 466 U.S. at 690-91; *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). If the counsel's performance is "deficient" and "prejudiced the defense," the defendant is entitled to relief. *Id.* at 687. The purpose of the *Strickland* test is to judge whether counsel's conduct compromised the proper functioning of the adversarial process, so the trial cannot be said to have produced a reliable result. *Thompson v. State*, 9 S.W.3d 808, 812-13 (Tex. Crim. App. 1992)); *Ex Parte Scott*, 190 S.W.3d 672, 677 n. 3 (Tex. Crim. App. 2006)(reasonable probability of a different outcome means it is sufficient to undermine confidence in the result).

A. TRIAL COUNSEL FAILED TO OBJECT TO THE ADEQUACY OF NOTICE PROVIDED BY THE STATE AS TO THE CHARGES OF THE PETITIONER ALLOWING THE PETITIONER TO BE CONVICTED AS A HABITUAL OFFENDER.

The Texas Constitution and Texas Code of Criminal Procedure required that an indictment provide an accused with adequate notice. Tex. Const. art. I, §10; Tex. Code. Crim. Proc. Ann. art. 1.05. The Texas Constitution requires that the charging instrument convey adequate notice to the Petitioner for him to be able to prepare his or her defense. *Moff*, 154 S.W. 3d at 601. Moreover, the Texas Code states "an indictment shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is mean, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged . . . " Tex. Code. Crim. Proc. Ann. art. 21.11 (Vernon 2009).

Trial Counsel's performance was deficient as he failed to object to the States attempt to enhance the conviction of the Petitioner without proper notice, and the deficient performance of trial counsel lead to the Petitioner being prejudicing as he was allowed to be charged as a habitual offender. Had the Trial Counsel performed to a standard of a reasonable attorney, the outcome of the Petitioner would have been different.

The Court of Appeals found that trial counsel failed to object to the adequacy of notice, and as such the issue

was waived. *Terrell v. State*, 2016 WL 4374949, at *5 (Tex. App. Aug. 16, 2016). The trial counsel was deficient in his performance as there was adequate time for an objection to be made which would have not led to this waiver.

The indictment lists the charge in which the Petitioner was convicted as. "Possession of a Controlled Substance; Enhanced." There was no notice in the indictment provided to the Petitioner of the state informing them of the intent to enhance the Petitioner to an Aggravated State Jail and contained no allegation that a deadly weapon was used or exhibited during the commission of the offense. (*Id*). On January 14, 2013, the State filed a Notice of Intent to Pursue a Deadly Weapon Instruction providing the introduction of evidence at the trial and request a jury instruction for finding that the "firearm" used or exhibited by the Petitioner pursuant to Art. 42.12 §3g(a)(2) of the Texas Code of Criminal Procedure. (*Id.*). Although the state filed pursuant to this provision of the code, the code itself does not provide notice of the State's intent to enhance the state jail felony to an aggravated state jail.

The indictment itself does not allege the use of a deadly weapon, and the state failed to provide the Petitioner with proper notice of the intent to charge the Petitioner with an Aggravated State Jail Felony. As such, due to the state failing to provide adequate notice of their intent to include the enhancement, the Petitioner should not have been subject to the enhancement without proper notice and process. All of which was waived due to the Trial Counsels deficiency in failing to object.

Therefore, as the trial counsel was deficient in failing to object to the enhancement as the State failed to provide

adequate notice. Had trial counsel not been deficient the outcome of the Petitioner would have been different, as the enhanced sentence of 50 years would not have been allowed had the trial counsel objected. Thus, the Texas Court of Criminal Appeal's decision conflicted with this Court's ruling in *Strickland*, by failing to grant the Petitioner's petition for the violation of his Sixth Amendment rights.

B. TRIAL COUNSEL FAILED TO OBJECT TO THE USE OF THE DELIVERY OF A CONTROLLED SUBSTANCE CONVICTION FOR ENHANCEMENT PURPOSES.

Trial Counsel failed to object to a prior conviction of the Application of Use of Delivery of a Controlled Substance for enhancement purposes. Trial Counsel's performance was deficient, in advising the Petitioner to plead true, as there was not enough information included to prove up the enhancement. This prejudiced the Petitioner, as had the prior conviction allowed for the enhancement in his sentence resulting in his 50-year sentence.

Texas Penal Code §12.42(d) states a defendant's punishment may be enhanced if " it is shown on the trial of a felony offense other than a state jail felony . . . that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment . . . or for any term of not more than 99 years or less than 25 years." Tex. Penal Code Ann. §12.42(d). In ensuring that a conviction is finalized, the trial court places on the defense to investigate the legitimacy of the State's

enhancement counts, and to call any deficiencies to the trial court's attention. *Ex Parte Pue*, 552 S.W.3d 226, 243 (Tex. Crim. App. 2018). Prima facie proof of a prior conviction is made by introduction of the prior judgment and sentence. *Johnson v. State*, 583 S.W.2d 399, 403 (Tex. Crim. App. 1979). Once a prima facie proof is made, finality of the conviction is presumed if the record is silent as to finality. *Ashley v. State*, 527 S.W.2d 302, 305 (Tex. Crim. App. 1975). If the record established a prior conviction as appealed, the conviction become final when the appellate court issues its mandate affirming the conviction, for which the State must demonstrate its finality. *Beal v. State*, 91 S.W.3d 794, 796 (Tex. Crim. App. 2002); *Ex Parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005).

Under this provision the trial counsel was deficient due to failing to challenge the use of the delivery of a controlled substance conviction for enhancement purposes. The indictment lists as enhancement the following: "(1) conviction on May 22, 1995, for Aggravated Assault with an affirmative finding of a deadly weapon in Cause No. 604690, in the 183rd Judicial District Court of Harris County, Texas, and (2) conviction on June 29, 1999, for possession with Intent to Deliver a controlled substance, more than one gram and less than 4 grams in Cause No. 816406, in the 183rd Judicial District court of Harris County, Texas."

The information provided by the State was insufficient to allow for an enhancement as the judgment which was introduced by the state for the second felony, only included the last page of the judgment, and failed to provide enough information to prove up to the enhancement. The judgment stated the Jury Verdict of Guilty entered on June 29,

1999, and stated the Petitioner was sentenced to six years imprisonment. The judgment failed to include information about what the offense he was convicted up, the level of the offense, whether it was a felony or a misdemeanor, the date of conviction, or the date of the offense. Most importantly, the record here indicated that a Notice of appeal was filed on June 30, 1999, but the record does not indicate that a mandate was issued.

As such, the Trial Counsel was deficient and failed to act objectively reasonable in advising the Petitioner to plead to the count as true. The Trial Counsel in failing to adequately observe the record and ensure the state provided the necessary information to show that the judgment contained all required information, and moreover, showing the appeal was final was detrimental to the Petitioner. The Trial Counsel's deficient performance greatly prejudiced the Petitioner as had the enhancement not been allowed the Petitioner would not be facing a 50-year sentence due to said enhancement.

Therefore, the Trial Counsel was deficient in his advising of the Petitioner and prejudiced the Petitioner leading to an incorrectly enhanced sentence. Thus, this Court should accept this petition of the Petitioner, as the outcome is in direct conflict with this Court's ruling in *Strickland*, as the Petitioner was not afforded effective assistance of counsel as required under the Sixth Amendment of the United States Constitution and this Court's precedent.

CONCLUSION

The harm suffered by Mr. Terrell in the denying his Objection's and failing to reconsider his sentence by way of Writ of Habeas Corpus relief in the Criminal Court of Appeals of Texas goes against the essence of the Constitution and the rulings of this Court, causing irreparable harm upon Mr. Terrell absent the relief requested here.

For the foregoing reasons this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS, DATED SEPTEMBER 18, 2024

FILE COPY

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

9/18/2024
TERRELL, ZACKERY Tr. Ct. No. 67366-A WR-81,721-02
This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Deana Williamson, Clerk

DISTRICT CLERK BRAZORIA COUNTY
111 E. LOCUST SUITE 500
ANGLETON, TX 77515-4678
* DELIVERED VIA E-MAIL *

APPENDIX B — ORDER OF THE DISTRICT COURT OF BRAZORIA COUNTY, TEXAS, 149TH JUDICIAL DISTRICT, FILED MAY 22, 2024

IN THE DISTRICT COURT OF
BRAZORIA COUNTY, TEXAS
149TH JUDICIAL DISTRICT

No. 67366-CR-A

EX PARTE ZACKERY TERRELL

Filed May 22, 2024

Proposed

ORDER DENYING RELIEF UNDER ARTICLE 11.07, TEXAS CODE OF CRIMINAL PROCEDURE, WITHOUT A HEARING

On this date, came on to be heard the Application for Writ of Habeas Corpus. The Court takes judicial notice of the contents of the Court's file in the above-entitled cause, and finds that the application does not contain sworn allegations of fact, which if true, would render the Applicant's confinement illegal, nor does it contain any unresolved facts material to the Applicant's confinement.

It is, therefore, ORDERED that a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law, but that all other relief requested is DENIED without an evidentiary hearing.

SIGNED on May 22, 2024.

/s/_____
JUDGE PRESIDING

APPENDIX C — MEMORANDUM OPINION OF THE COURT OF APPEALS OF TEXAS, HOUSTON FOR THE FIRST DISTRICT, FILED AUGUST 16, 2011

COURT OF APPEALS OF
TEXAS, HOUSTON (1ST DIST.)

No. 01-14-00746-CR

ZACKERY TERRELL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Filed August 16, 2016

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Do not publish. Tex. R. App. P. 47.2(b).

On Appeal from the 149th District Court, Brazoria County, Texas, Trial Court Case No. 67366

Panel consists of Justices Jennings, Massengale, and Huddle.

MEMORANDUM OPINION

Appendix C

Michael Massengale, Justice

A jury convicted appellant Zackery Terrell of possession of a controlled substance, cocaine, in an amount less than one gram. *See* Tex. Health & Safety Code § 481.115(b). He pleaded true to two enhancement allegations, specifically that he previously had been convicted of aggravated assault with a deadly weapon and possession with intent to deliver a controlled substance, cocaine, in an amount between one and four grams. The trial court assessed punishment of 50 years in prison.

On appeal, Terrell contends that he received ineffective assistance of counsel, asserting that his trial counsel failed to advise him properly of the full range of punishment before he rejected a plea-bargain offer. He also contends that the trial court entered an illegal sentence. We affirm.

Background

Zackery Terrell was stopped for a traffic offense and arrested for driving with a suspended license and without insurance. Police officers conducted an inventory search, which uncovered a loaded handgun, drug paraphernalia containing a residue of cocaine, more than $12,000 in cash, and approximately 530 grams of liquid codeine and promethazine.

Approximately six weeks after his arrest, Terrell was charged by indictment with possession of less than one gram of cocaine. *See* Tex. Health & Safety Code § 481.115(b). The indictment included two enhancement

paragraphs, alleging that prior to the commission of the indicted offense, Terrell had been convicted of two sequential crimes. In 1995, he committed the felony offense of aggravated assault with a deadly weapon. After that conviction became final, Terrell was convicted of the felony offense of possession of between one and four grams of cocaine. The State later gave notice of its intent to request an instruction and jury finding that the handgun used in the commission of the charged offense was a deadly weapon.

Prior to jury selection, the trial court considered Terrell's motion in limine, which sought to exclude all evidence regarding extraneous crimes or misconduct. Although the charged offense of possession of less than a gram of cocaine is a state-jail felony, the punishment range could be enhanced to 25 years to life in prison if the State proved that Terrell used a deadly weapon in the commission of the charged offense and previously had been convicted of the two sequential felonies charged in the enhancement paragraphs of the indictment. *See* Tex. Penal Code § 12.42(d). The trial court agreed that the State should be prohibited from mentioning any prior convictions during the guilt-or-innocence phase of trial but stated, "they are going to get to voir dire on the possible ranges of punishment." The court and counsel then discussed how the voir dire could be conducted to meet both objectives. During this discussion, the possible enhanced punishment range of 25 years to life in prison was mentioned 11 times by counsel and the court, and the minimum sentence of 25 years was mentioned an additional two times. There was no mention of any plea offer, and

there was no indication that Terrell misunderstood the possible punishment range. The record shows that the 25 years to life punishment range was not mentioned in front of the jury.

The jury found Terrell guilty, and the court assessed punishment of 50 years in prison. After trial counsel failed to timely file a notice of appeal, Terrell filed a petition for writ of habeas corpus seeking an out of time appeal. The trial court agreed that trial counsel was ineffective for failing to file a motion for new trial, and the Court of Criminal Appeals granted an out-of-time appeal.

Terrell then filed a motion for new trial and motion in arrest of judgment. His motion for new trial alleged that his trial counsel was ineffective in 11 different ways, including failing to advise him properly of the range of punishment and the possible results of trial. The motion for new trial did not mention a plea offer or assert that if trial counsel had given proper advice about the range or punishment and possible results of trial, that Terrell would have accepted the plea agreement rather than go to trial.

The trial court held a hearing on the motion for new trial about 18 months after the trial. Terrell testified that his retained trial counsel, Arthur Washington, told him at their first meeting that he had been charged with a state-jail felony. Terrell testified that Washington later advised him that the range of punishment was two to ten years in prison, but on the day of trial, he said that the punishment range was two to twenty years. Terrell also testified that on the day of trial, the judge informed him, in front of the

jury, that the punishment range was 25 years to life in prison. Terrell alleged that Washington never discussed with him the deadly-weapon allegation or mentioned a punishment range of 25 years to life in prison.

Terrell acknowledged that Washington conveyed a plea offer of seven years, which he rejected because he thought the range of punishment was two to ten years in prison, and he believed the only difference between a seven-and a ten-year sentence was the amount of time he would spend on parole. Terrell thought that with either sentence he would most likely have the same parole date. But he did not speak up when he heard the court say that the range of punishment was 25 years to life in prison. He testified that he was surprised, did not think he could "say something then," and believed that he no longer had the right to accept the plea offer. Terrell had hoped for a two-year plea bargain, but he would have taken the seven-year plea bargain if he had thought the range of punishment allowed a sentence as long as 20 years.

Arthur Washington also testified at the motion for new trial hearing. Most of the questioning centered on the legal question of what level felony had been alleged and the appropriate range of punishment. At first, Washington testified that he had advised Terrell that the range of punishment would be two to ten years in prison. He later recalled that the offense was indicted as a state-jail felony, enhanced by the notice seeking to prove that Terrell used a deadly weapon, and further enhanced by two habitual offender allegations, all of which raised the punishment range to 25 years to life in prison. Neither Terrell's

appellate counsel nor the prosecutor asked Washington if he had advised Terrell that the range of punishment could be 25 years to life in prison if all the enhancements were proven. Washington testified that the State made a final plea offer of seven years in prison, which would have resulted in the dismissal of all other pending cases against him in Brazoria County, but Terrell rejected it.

The trial court denied the motion for new trial, and Terrell appealed.

ANALYSIS

Terrell raises two issues on appeal. First, he argues that he received ineffective assistance of counsel. He asserts that his trial counsel mistakenly advised him about the range of punishment and that he relied on this erroneous advice when he rejected a plea-bargain offer for seven years in prison. Second, he argues that the trial court's sentence was greater than that allowed by statute.

I. Ineffective assistance of counsel

When a defendant claims his plea was involuntary due to ineffective assistance of counsel, often he has pleaded guilty but argues he would have gone to trial but for counsel's erroneous advice. *See, e.g.*, *Labib v. State*, 239 S.W.3d 322, 333 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Ex parte Moody*, 991 S.W.2d 856, 857-58 (Tex. Crim. App. 1999)). Terrell raises the opposite complaint: he argues that his trial counsel erroneously advised him of the range of punishment he could face, and if he had

known the steep penalty he faced at trial, he would have pleaded guilty and accepted a seven-year prison term.

A claim of ineffective assistance of counsel must be "'firmly founded in the record' and 'the record must affirmatively demonstrate' the meritorious nature of the claim." *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). To prove a claim of ineffective assistance of counsel, an applicant must show that trial counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that but for counsel's unreasonable error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Because the record must affirmatively demonstrate the alleged ineffectiveness, a defendant's uncorroborated testimony about counsel's errors will not establish ineffective assistance of counsel. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Arreola v. State*, 207 S.W.3d 387, 391 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

At the hearing on the motion for new trial, Terrell testified about the advice he received. He said that Washington initially told him that he was charged with a state-jail felony. The punishment range for a state-jail felony is 180 days to two years in state jail. Tex. Penal Code § 12.35(a). Terrell testified that after the State later alleged prior felony convictions to enhance the offense, Washington told him that the range of punishment was

two to ten years in prison. Terrell also testified that on the day of trial, Washington advised him the punishment range was two to twenty years in prison. According to Terrell, his trial counsel never discussed with him the deadly-weapon allegation or a punishment range of 25 years to life in prison.

Terrell's testimony arose in a hearing on a motion for new trial. The trial court, as factfinder, was not required to accept his testimony as true. *See Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014); *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006); *Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001). "Even if the testimony is not controverted or subject to cross-examination, the trial judge has discretion to disbelieve that testimony." *Colyer*, 428 S.W.3d at 122.

Washington testified that *before* he received the State's notice of intent to prove use of a deadly weapon, he advised Terrell that with the two enhancement allegations the state-jail felony was enhanced to a third-degree felony with a range of punishment between two and ten years in prison. Washington was not asked what other advice he gave to Terrell about the punishment range as the case progressed.

Washington's testimony at the hearing on the motion for new trial—18 months after the trial—reflected some confusion about the felony grade and punishment range at issue. Terrell argues that this confusion is evidence that Washington's representation was unreasonable. But the quality of trial counsel's memory or knowledge at the

time of the hearing is not directly at issue. The question about whether there was ineffective assistance of counsel depends instead on what Washington told Terrell about the punishment range before trial.

Although Washington exhibited some confusion on the matter at the evidentiary hearing, the record from the pretrial hearing on Terrell's motion in limine demonstrates his contemporaneous understanding that based on the indictment, enhancements, and notice of intent to prove use of a deadly weapon, Terrell faced a punishment range of 25 years to life in prison as a habitual offender. Washington advocated for a prohibition on mentioning any of Terrell's prior convictions during voir dire because he knew the State would be interested in questioning the panel about its ability to consider the full range of punishment, especially when the State was seeking 25 years to life imprisonment on possession of less than a gram of cocaine.

On his claim of ineffective assistance of counsel, it was Terrell's burden to show by a preponderance of the record evidence that Washington failed to provide reasonably competent professional advice by failing to advise him about the potential range of punishment. Because the trial court could have disbelieved Terrell's testimony that his trial counsel never advised him of the correct range of punishment, we conclude that the trial court did not abuse its discretion by denying the motion for new trial, and we overrule this issue.

Appendix C

II. Sentencing under the habitual-offender statute

In his second issue, Terrell argues that the court erred by rendering an illegal sentence because he was sentenced under the wrong habitual felony offender provision. He was sentenced under Penal Code section 12.42(d), which provides for punishment of 25 years to life, but he contends he should have been sentenced under section 12.425(c) and its second-degree felony punishment range of 2 to 20 years. *See* Tex. Penal Code § 12.33. Terrell also contends that the notice given by the State was insufficient to apprise him of the intent to enhance his punishment as a habitual offender.

A. Preservation of error

The State contends the challenge to Terrell's sentence was waived by the failure to object or otherwise raise the issue in the trial court. As support for its waiver argument, the State relies upon *Mercado v. State*, 718 S.W.2d 291, 296 (Tex. Crim. App. 1986), *Holmes v. State*, 380 S.W.3d 307, 308 (Tex. App.—Fort Worth 2012, pet. ref'd), *Ponce v. State*, 89 S.W.3d 110, 114-15 (Tex. App.—Corpus Christi 2002, no pet.), and *Quintana v. State*, 777 S.W.2d 474, 479 (Tex. App.—Corpus Christi 1989, pet. ref'd).

In *Mercado v. State*, 718 S.W.2d 291 (Tex. Crim. App. 1986), the appellant challenged a trial court's affirmative finding of the use of a deadly weapon on the grounds that "it was entered after he gave notice of appeal and was, therefore, untimely and vindictive." 718 S.W.2d at 295. The Court of Criminal Appeals observed: "As a general

rule, an appellant may not assert error pertaining to his sentence or punishment where he failed to object or otherwise raise such error in the trial court." *Id*. at 296.

This "general rule" does not extend to preclude review of a sentence that is illegal due to the fact that it is outside the maximum or minimum range of punishment. *See Mizell v. State*, 119 S.W.3d 804, 806-07 (Tex. Crim. App. 2003). Any court with jurisdiction may notice and correct an illegal sentence, even if the defendant did not object in the trial court. *Id*. at 806-07 & n.17. To the extent the court in *Ponce v. State*, 89 S.W.3d 110 (Tex. App.—Corpus Christi 2002, no pet.), interpreted *Mercado* to require objections to illegal sentences to be preserved in the trial court, the subsequent *Mizell* opinion clarified the rule to be otherwise. *Quintana v. State*, 777 S.W.2d 474 (Tex. App.—Corpus Christi 1989, pet. ref'd), is inapposite because it addressed preservation requirements relating to a claim that a sentence violated constitutional prohibitions of cruel and unusual punishments. *See Quintana*, 777 S.W.2d at 479. Finally, *Holmes v. State*, 380 S.W.3d 307 (Tex. App.—Fort Worth 2012, pet. ref'd), is distinguishable because it presented an as-applied due-process challenge to the application of the Penal Code, which requires preservation in the trial court. *See Holmes*, 380 S.W.3d at 308 (citing *Anderson v. State*, 301 S.W.3d 276, 279-80 (Tex. Crim. App. 2009)).

To the extent Terrell challenges the adequacy of notice that the State sought to have him sentenced as a habitual felony offender pursuant to Penal Code section 42.12(d), we agree with the State that the objection was not raised

in the trial court and therefore has been waived. *See* Tex. R. App. P. 33.1(a). To the extent Terrell challenges the sentence itself as being void and illegal because section 42.12(d) does not apply, we conclude no trial objection was required to challenge the sentence on appeal. *See Mizell*, 119 S.W.3d at 806-07.

B. Habitual offender punishment ranges

With no enhancements, the punishment for conviction of a state-jail felony is confinement in state jail between 180 days and two years. Tex. Penal Code § 12.35(a). When the defendant is found to have "used or exhibited" a deadly weapon "during the commission of the offense or during immediate flight following the commission of the offense," the punishment is enhanced to that of a third-degree felony, i.e., confinement in prison for two to ten years. *Id.* §§ 12.34, 12.35(c). This is known as an aggravated state-jail felony. *See Ford v. State*, 334 S.W.3d 230, 233 (Tex. Crim. App. 2011).

An aggravated state-jail felony may be enhanced further by the habitual-offender statutes. *Id.* Penal Code section 12.425 establishes enhanced punishments for a defendant on trial for a state-jail felony. Only subsection (c) applies to aggravated state-jail felonies, and it provides for stricter punishment if the defendant has one prior felony conviction:

> If it is shown on the trial of a state jail felony for which punishment may be enhanced under Section 12.35(c) that the defendant has

> previously been finally convicted of a felony other than a state jail felony punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the second degree.

Tex. Penal Code § 12.425(c).

Finally, section 12.42(d) establishes a more stringent punishment range for three-time repeat felony offenders. The statute provides:

> [I]f it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years.

Id. § 12.42(d).

Terrell argues that the sentence for his conviction is controlled by Penal Code section 12.425(c), which applies a maximum punishment equivalent to a second-degree felony, and that the statute does not permit any state-jail felony to be enhanced to punishment beyond that of a second-degree felony. We disagree.

Appendix C

Section 12.425(c) could apply to Terrell's offense, because it is the only provision of section 12.425 that applies to aggravated state-jail felonies. The other provisions of section 12.425, subsections (a) and (b), are both limited to ordinary state-jail felonies, as indicated by text in each subsection specifying application to "a state jail felony punishable under Section 12.35(a)." *Id.* § 12.425(c). Subsection (c) applies only to aggravated state-jail felonies—those "for which punishment may be enhanced under Section 12.35(c)"—and provides for an enhanced punishment equivalent to a second-degree felony in the event the defendant "has previously been finally convicted of a felony other than a state jail felony punishable under Section 12.35(a)." *Id.*

But nothing in the text of section 12.425 supports Terrell's contention that it is the exclusive means of enhancing state-jail felony punishments on the basis of habitual offenses. Contrary to Terrell's argument, section 12.42(d) expressly provides that it may apply to a "felony offense other than a state jail felony punishable under section 12.35(a)." *Id.* § 12.42(d). Since an aggravated state-jail felony offense is not punishable under section 12.35(a), and is instead punishable under section 12.35(c), it is included among the felony offenses eligible for sentencing under section 12.42(d). *Id.* Section 12.42(d) unambiguously made Terrell eligible for sentencing as a repeat and habitual felony offender because he met that provision's other criteria of having "been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final." *See id.*

Thus an aggravated state-jail felony may be enhanced to habitual-offender status under section 12.42 by two sequential prior felony convictions.*

Terrell relies on the title of section 12.42—"Penalties for Repeat and Habitual Felony Offenders on Trial for First, Second, or Third Degree Felony"—to support his contention that the statute has no application to state-jail felonies, which may have their sentences enhanced to the same level as first, second, or third degree felonies, but do not thereby become first, second, or third degree felonies. *See, e.g.*, *Samaripas v. State*, 454 S.W.3d 1, 7 (Tex. Crim. App. 2014); *Ford*, 334 S.W.3d at 234-35. While the title or caption of a statute may be an aid to statutory construction when the statutory text is ambiguous, we find no ambiguity here and thus no need to resort to canons of construction. *See, e.g.*, *Tapps v. State*, 294 S.W.3d 175, 179 (Tex. Crim. App. 2009). When a statute "is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Boykin v. State*, 818

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* This court interpreted a prior version of section 12.42(d) in *Smith v. State*, 960 S.W.2d 372, 375 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). The *Smith* opinion analyzed the statute as amended in 1993. *See Smith*, 960 S.W.2d at 375 (interpreting statutory revisions as introduced by the Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3604). The court drew the conclusion that "an aggravated state jail felony may be enhanced by two prior convictions in the proper sequence to habitual offender status under subsection (d)." *Id.* at 374. As discussed above, the current version of section 12.42(d) has codified that interpretation by clarifying that the statute applies as it was interpreted in *Smith*.

S.W.2d 782, 785 (Tex. Crim. App. 1991). While statutory titles can be a useful indicator of meaning, "they are of use only when they shed light on some ambiguous word or phrase," and "they cannot undo or limit that which the text makes plain." *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 529, 67 S. Ct. 1387, 1392 (1947); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: the Interpretation of Legal Texts 222 (2012) ("a title or heading should never be allowed to override the plain words of a text").

Terrell was charged with the state-jail felony offense of possession of less than one gram of cocaine. *See* Tex. Health & Safety Code § 481.115(b). The State gave notice of intent to prove use of a deadly weapon during the commission of this offense and proved it at trial. If no other enhancements had been proven, Terrell would have been sentenced for an aggravated state-jail felony. *See* Tex. Penal Code § 12.35(c). However, the indictment included two enhancement allegations. The first enhancement alleged that Terrell was convicted in 1995 of aggravated assault with a deadly weapon. This was a second-degree felony. *See id.* § 22.02. The second enhancement alleged that after the 1995 aggravated-assault conviction became final, Terrell was convicted of possession of between one and four grams of cocaine. This was a third-degree felony. *See* Tex. Health & Safety Code § 481.115(c). With proof of only one prior felony conviction, Terrell would have been sentenced under section 12.425(c). In this case, however, the State proved two prior sequential felony convictions; thus Terrell was subject to sentencing under section 12.42(d), for a period of confinement in prison of 25 years to life.

The court sentenced Terrell to 50 years in prison, a period within the statutory sentencing range. *See* Tex. Penal Code § 12.42(d). Accordingly, we overrule his issue complaining of an illegal sentence.

CONCLUSION

We affirm the judgment of the trial court.

APPENDIX D — OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS, FILED AUGUST 20, 2014

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-81,721-01

EX PARTE ZACKERY TERRELL,

Applicant.

Filed August 20, 2014

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 67366-A IN THE 149TH DISTRICT COURT FROM BRAZORIA COUNTY

Per curiam.

OPINION

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). A jury convicted Applicant of possession of cocaine. The trial court found the indictment's habitual-felon enhancement true and assessed a fifty year sentence.

Applicant contends that he was denied his right to appeal the conviction and sentence through no fault of his own. *See Ex parte Axel*, 757 S.W.2d 369 (Tex. Crim.

App. 1988). The trial court conducted a hearing and appointed habeas counsel. Trial counsel was given notice of the hearing but did not appear. The State also indicates that it attempted to contact trial counsel three times by telephone and left messages but that he never returned the calls. The trial judge notes that the trial docket sheet indicates that Applicant expressed a desire to appeal after sentencing but that trial counsel never filed a notice of appeal and never withdrew as counsel for Applicant. With the State's agreement, the trial court recommends granting a late appeal. The recommendation is supported by the habeas record forwarded to this Court.

Applicant is entitled to the opportunity to file an out-of-time appeal of the judgment of conviction in Cause No. 67366 from the 149th District Court of Brazoria County. Applicant is ordered returned to that time at which he may give a written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal.

Within ten days of the issuance of this opinion, the trial court shall determine whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall immediately appoint an attorney to represent Applicant on direct appeal. All time limits shall be calculated as if the sentence had been imposed on the date on which the mandate of this Court issues. We hold that, should Applicant desire to prosecute an appeal, he must take affirmative steps to file a written notice of appeal in the trial court within 30 days after the mandate of this Court issues.

Appendix D

Copies of this opinion shall be sent to the Texas Department of Criminal Justice-Correctional Institutions Division and Pardons and Paroles Division.

Delivered: August 20, 2014

Do not publish

APPENDIX E — OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS, DATED OCTOBER 25, 2024

FILE COPY

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

10/25/2024
TERRELL, ZACKERY Tr. Ct. No. 67366-A WR-81,721-02
This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

ZACKERY TERRELL
STRINGFELLOW UNIT - TDC # 1850162
1200 FM 655
ROSHARON, TX 77583