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MABRY, PHILLIP

Tr. Ct. No. F21-52348-S

PD-0255-25

On this day, the Appellant's Pro Se motion for rehearing has been denied.
JUDGE SCHENCK WOULD GRANT

Deana Williamson, Clerk

19242

PHILLIP MABRY
TELFORD UNIT - TDC # 2451388
3899 STATE HWY 98
NEW BOSTON, TX 75570

AIZZAB 75570



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

10/30/2025

MABRY, PHILLIP

Tr. Ct. No. F21-52348-S

COA No. 05-23-00531-CR

PD-0255-25

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

PHILLIP MABRY

TELFORD UNIT - TDC # 2451388

3899 STATE HWY 98

NEW BOSTON, TX 75570



DAVID J. SCHENCK
PRESIDING JUDGE

COURT OF CRIMINAL APPEALS

P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

DEANA WILLIAMSON
CLERK
(512) 463-1551

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Thursday, October 30, 2025

Phillip Mabry
Telford Unit - Tdc # 2451388
3899 State Hwy 98
New Boston, Tx 75570

Re: Mabry, Phillip
CCA No. PD-0255-25
Trial Court Case No. F21-52348-S

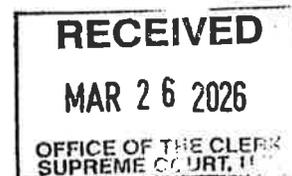
COA No. 05-23-00531-CR

A dissenting opinion has issued in the above styled case.

Sincerely,

Deana Williamson, Clerk

cc: State Prosecuting Attorney (Delivered Via E-Mail)
District Attorney Dallas County (Delivered Via E-Mail)
5th Court Of Appeals Clerk (Delivered Via E-Mail)





**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-0255-25

PHILLIP MABRY, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIFTH COURT OF APPEALS
DALLAS COUNTY**

SCHENCK, P.J. filed a dissenting opinion.

Appellant, Phillip Mabry, asserts the trial court failed to afford him his common-law right of allocution. The Court today refuses his petition for discretionary review without regard to the merits of the lower court's opinion.

Mabry's argument below (and here) presented at least two basic questions of law that fester unanswered in the lower courts, particularly the Fifth District, and continually arise in cases where the defendant has been denied his statutory right to

allocute, his common-law right, or both.¹ The first is procedural: whether the prostrate defendant about to be sentenced by the judge must object to inform that same judge of the law governing the pronouncement of his sentence to preserve his right to be “asked if he has anything to say why the sentence should not be pronounced against him.” TEX. CODE CRIM PROC. art. 42.07. The second is substantive: whether the common-law right that arguably provides broader right to speak was displaced silently by enactment of the Code.

The former, procedural question was last answered in *Tenon v. State*, 563 S.W.2d 622 (Tex. Crim. App. 1978) (affirming the appellant’s judgment and overruling her interest in a right to common-law allocution).² For three decades now, appointed counsel have presented plausible, good faith arguments as to (1) whether *Tenon* governs, and (2) whether the common-law right exists at all. When the arguments reach this Court, we then refuse to hear, much less answer, them. The taxpayers thus continue to fund this circle. I would answer both questions in this case or some other in view of our decision in *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), and in *Tates v. State*, No. PD-0486-23, 2025 WL 1812826

¹ Mabry concedes that he received his statutory right, but complains that he was denied a broader common-law right. See *Green v. United States*, 365 U.S. 301, 304 (1961) (“As early as 1689 . . . it was recognized that the court’s failure to ask the defendant if he had anything to say before sentence was imposed required reversal.”).

² *Tenon* was decided before *any* rules of appellate procedure were enacted. The original rules debuted in 1981. Those rules were substantially revised in 1997.

(Tex. Crim. App. July 2, 2025) (declaring a trial court’s like failure to adhere to a “shall” directive in the same Chapter of our Code to be *Marin* “type II”³ in nature). Moving on to give *any* answer to either substantive question will presumably end the recurring stream of appeals below us.

Because we do nothing today to effectuate this purpose, I dissent.

Filed: October 30, 2025

Publish

³ “[O]ur system may be thought to contain rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request.” *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993).



DAVID J. SCHENCK
PRESIDING JUDGE

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Thursday, October 30, 2025

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New Boston, Tx 75570

Re: Mabry, Phillip
CCA No. PD-0255-25
Trial Court Case No. F21-52348-S

COA No. 05-23-00531-CR

A concurring opinion has this day been issued.

Sincerely,

Deana Williamson, Clerk

cc: State Prosecuting Attorney (Delivered Via E-Mail)
District Attorney Dallas County (Delivered Via E-Mail)
5th Court Of Appeals Clerk (Delivered Via E-Mail)



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-0255-25

PHILLIP MABRY, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIFTH DISTRICT COURT OF APPEALS
DALLAS COUNTY**

NEWELL, J., filed a concurring opinion.

Once again, this Court wrestles with a controversy entirely of our own making. This case is easily resolved and should have been resolved much sooner. Indeed, this case is emblematic of all the reasons why it has become harder and harder for the Court to resolve cases. Until the Court starts following its precedent and stops reaching out to answer

questions no one is asking us to, our caseload will increase along with related wait times for resolution.

The Trial Court Afforded Appellant an Opportunity to Allocute

In the court of appeals, Appellant argued that his right of allocution was violated at sentencing.¹ Here is the exchange between the trial court and Appellant immediately before imposition of sentence:

[Trial Court]: In taking into consideration all of the facts and circumstances in this case. Both in guilt and innocence phase, I assess your punishment at 30 years confinement in Texas Department of Criminal Justice.

Counsel, is there any legal reason why sentence should not be imposed?

[Defense counsel]: No, Your Honor.

This is the same script used by trial judges past and present. Even Appellant agrees (as he conceded in his brief to the court of appeals) that this satisfied his right to allocution codified under Article 42.07 of the Code of Criminal Procedure.

Notably this exchange happened after the punishment phase of the trial. During that phase of the trial, Appellant had the opportunity to present evidence to mitigate his punishment. Appellant also had the opportunity to testify on his behalf, which he affirmatively declined. And

¹ Br. for Appellant at 8, *Mabry v. State*, No. 05-23-00531-CR, 2025 WL 1128802 (Tex. App.—Dallas Apr. 16, 2025, pet. filed).

he had the opportunity to have his lawyer plea for mercy during a closing statement prior to the trial court's assessment of punishment. The only "allocution" error Appellant points to is that the trial court asked his attorney if there was a legal bar to the imposition of sentence instead of asking Appellant himself. It is this call to a "common-law" right of allocution that Appellant argued to the court of appeals.

**Any Common-Law Right of Allocution
Is Less Expansive Than Meets the Eye**

Not many common-law rights have been elevated to the status of constitutional rights², and the "right of allocution" does not appear to be one of them.³ The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.⁴ There is certainly no textual authority in the federal or Texas constitutions to suggest that a defendant has a due process right to be addressed directly by the trial court before imposition of sentence after he's had an opportunity to

² *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384 (1979).

³ Indeed, the United States Supreme Court has held that the failure to ask a defendant who is represented by counsel whether he has anything to say before sentence is imposed is not a jurisdictional or constitutional error. *Hill v. United States*, 368 U.S. 424, 428 (1962) ("The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional.").

⁴ *Silver v. Silver*, 280 U.S. 117, 122 (1929).

present his case for mitigation of punishment during the punishment phase of trial.

The idea that there's some expansive yet sub-constitutional right of allocution seems to flow from a misunderstanding of the United States Supreme Court decision in *Green v. United States*.⁵ That case specifically interpreted a federal rule of criminal procedure and was not based upon any broad common-law right of allocution. Any discussion of a common-law right of allocution arose in the context of federal sentencing procedure, which is quite different than the punishment phase of trial at issue in Texas. In the context present in *Green*, the alleged denial of allocution occurred before the trial court even assessed punishment.⁶ In that way, the defendant's claim was more that he was deprived of an opportunity to present mitigating evidence or at least make a closing summation; but he called it a "right of allocution".⁷ That is why the Supreme Court in *Green* held that the defendant had not been denied his opportunity for allocution, because the Court recognized that the defendant could have chosen to exercise his right to allocution through his counsel who had spoken at length on the defendant's

⁵ 365 U.S. 301, 81 S. Ct. 653 (1961).

⁶ *Green*, 365 U.S. at 303.

⁷ *Id.*

behalf.⁸ Simply put, the alleged denial of a right to allocute in *Green* was the denial of an ability to put on a defense case prior to the assessment of sentence.

But in Texas, allocution occurs after sentence has already been assessed.⁹ As the Waco Court of Appeals noted in *Eisen v. State*:

At the time article 42.07 comes into play, legal matters on the record have already been brought to the court's attention; factual matters relating to punishment have been presented through the evidence. The limitations of that article are designed to allow the defendant to bring to the court's attention legal bars to the imposition of punishment that may not be of record, specifically including a pardon, incompetency, and mistaken identity.¹⁰

Any potential common-law right that a defendant might have to plead for mitigation at punishment has already been afforded him through the punishment phase of the trial. The only purpose "allocution" serves in Texas is to alert the trial court to legal bars to the imposition of sentence.¹¹ Article 42.07 lists the specific reasons a trial court is

⁸ *Id.* at 305.

⁹ *Eisen v. State*, 40 S.W.3d 628, 632 (Tex. App.—Waco 2001, pet. ref'd).

¹⁰ *Id.* at 635.

¹¹ Texas has long had a procedural rule implementing allocution (again, not to be confused with the punishment phase of the trial). The reasons an accused could advance to prevent the imposition of sentence were: (1) that the defendant had received a pardon from the proper authority; and (2) that the defendant was insane. *Snodgrass v. State*, 150 S.W. 162, 172 (1912). Substantially the same rule was provided in Article 861 of the Revised Code of Procedure of 1911. *Id.* Article 773 of the Penal Code of 1925 allowed four responses by the accused: (1) that the accused had received a pardon; (2) that he was insane; (3) that there has been no motion for new trial or a motion in arrest of judgement, and he desired to make

prohibited from imposing sentence; a plea for mitigation is not one of them.¹²

Of course, even assuming that the statute has been violated by the trial court addressing Appellant's counsel instead of Appellant himself, I find it hard to see how Appellant could show he was harmed by this statutory error.¹³ Again, Appellant was afforded an entire punishment phase of trial in which to put on a mitigation case.

But even if Appellant could show harm, the remedy would not seem to be the new punishment hearing Appellant requested of the court of appeals. It would necessarily be a new pronouncement and imposition of sentence. And if the statutory bars to the imposition of sentence listed in Article 42.07 are not present, I doubt there would be any allocution on remand.¹⁴ In short, I see no reason to engage in

one and had good grounds therefore; and (4) that he claimed that he was not the person convicted. *Hughes v. State*, 293 S.W. 575, 576 (1927). From this brief history in Texas, I find it very hard to see the type of expansive "common law" right that prohibits the imposition of sentence unless the trial court directly asks a defendant personally if he can think of any reason why sentence should not be imposed.

¹² See Tex. Code Crim. Proc. Ann. art. 42.07.

¹³ I would not even begin to know how to assess harm for a violation of a "common-law right," but presumably it would be on par with a statutory harm analysis.

¹⁴ *Tenon v. State*, 563 S.W.2d 622, 624 (Tex. Crim. App. 1978) ("Surely appellant would not have this court reverse this cause and order a new sentencing hearing so that when the court asks her if she has anything to say why sentence should not be pronounced against her she can then answer 'Nothing'.").

judicial adventurism to reach the merits of Appellant's issue when the issue so clearly lacks merit.

While *Degrade* Doesn't Prevent Review, *Degrade* Explains Why This Court Should Not Grant Review

But there's another reason we don't need to grant discretionary review in this case: Appellant did not present this Court with any reason to suggest the court of appeals decision needs review. While our decision in *Degrade v. State* certainly doesn't prevent this Court from granting discretionary review, it's clear from Appellant's petition he has not given us a reason to call the Dallas Court of Appeals into the principal's office.¹⁵

Appellant raised his claim regarding "allocution" for the first time on appeal. We held in *Tenon v. State* that a defendant must object to the trial court in order to complain on appeal of a denial of a right to allocution.¹⁶ We have not revisited this case. And many courts of

¹⁵ *Degrade v. State*, 712 S.W.2d 755, 756-57 (Tex. Crim. App. 1986) (noting that a petition for discretionary review that merely reiterates the same points of error from the direct appeal brief presents nothing for this Court's review). Indeed, consider this from the perspective of the lower courts. The trial court could be reversed for following a statute and the court of appeals could be reversed for following this Court's precedent. They'll think we're high.

¹⁶ *Id.*

appeals have followed this binding precedent.¹⁷ Understandably, the court of appeals followed this precedent in this case.¹⁸

Notably, Appellant has never taken issue with this body of case law. He didn't argue that to the court of appeals. And on discretionary review he has merely cut and pasted his appellate brief to the court of appeals. He is not the one arguing that this Court should reconsider *Tenon*. We thought of that all on our own.

By not making any arguments about why the court of appeals needs to be corrected, Appellant puts this Court in the position of having to make arguments on Appellant's behalf. He has provided no explanation or argument to this Court that our decision in *Marin v. State*¹⁹ has undermined our decision in *Tenon*. He doesn't even cite to *Marin*. Or *Tenon*. Any argument to overrule rather than follow our binding precedent comes from us, not one of the parties. While I am

¹⁷ See e.g., *Hall v. State*, No. 05-18-00442-CR, 2019 WL 3955772, at *1 (Tex. App.—Dallas Aug. 22, 2019, pet. ref'd) (not desig. for pub.); *Anguiano v. State*, No. 05-21-00685-CR, 2022 WL 2914024, at *5 (Tex. App.—Dallas July 25, 2022, no pet.) (not desig. for pub.); *Casselberry v. State*, No. 05-22-00014-CR, 2022 WL 14381667, at *2 (Tex. App.—Dallas Oct. 25, 2022, no pet.) (not desig. for pub.); *Bleuel v. State*, No. 09-23-00374-CR, 2024 WL 3515064, at *5 (Tex. App.—Beaumont July 24, 2024, no pet.) (not desig. for pub.).

¹⁸ *Mabry v. State*, No. 05-23-00531-CR, 2025 WL 1128802, at *4 (Tex. App.—Dallas Apr. 16, 2025, pet. filed).

¹⁹ 851 S.W.2d 275, 282 (Tex. Crim. App. 1993).

amenable to reading briefing liberally²⁰, I do not believe that authorizes us to brief the issue on the behalf or one of the parties or redraw a petition for discretionary review. It's one thing to try and discern what a defendant is arguing and quite another to make arguments that are not there.

Yet, the Court is again arguing about reconsidering its own precedent when neither party has complained.²¹ And yet again, we are reaching out to argue an issue that no one is asking us to. The more we do this, the more uncertainty we inject into the criminal justice system. Such behavior creates chaos not certainty.

I join the Court's decision to refuse discretionary review.

Filed: October 30, 2025

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²⁰ See, e.g., *Lion Copolymer Holdings, LLC v. Lion Polymers, LLC*, 614 S.W.3d 729, 732 (Tex. 2020) (However, briefs must also "be liberally, but reasonably, construed so that the right to appeal is not lost by waiver.").

²¹ See, e.g., *Ex parte Eric Todd Williams*, Applicant, No. WR-96,658-01, 2025 WL 2982030 (Tex. Crim. App. Oct. 23, 2025).