

26-5057

No. _____

FILED

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

PRO SE: JAMES ARTHUR BROWN — PETITIONER
(Your Name)

THE STATE OF TEXAS, ^{VS.}
JOSÉ P. GARZA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF CRIMINAL APPEALS NO. WR-93,988-0:
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAMES A. BROWN
(Your Name)

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QUESTIONS PRESENTED

A.) CAN SUBJECT-MATTER JURISDICTION BE FORFEITED BY COURTS THROUGH A HYBRID REPRESENTATION WAIVER?

B.) IS BROWN ACTUALLY INNOCENT OF ASSAULT AND AGGRAVATED ASSAULT AS CHARGED IN THE INDICTMENT?

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José P. Garza
District Attorney
Travis County, Texas

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Brown v. state, PD-0729-15

Brown v. Davis, No. A-15-cv-951-ss (W.D. Tex. Feb. 8, 2016)

Brown v. state, No. 16-50481 (5th Cir. Jan. 23, 2018)

Brown v. state, A-18-cv-00135 (W.D. Tex. March 26, 2018)

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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 _____ 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☐ is unpublished.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 _____ 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☐ is unpublished.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 A to the petition and is

- ☒ reported at WR-93, 988-02; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the COURT OF CRIMINAL APPEALS OF TEXAS court appears at Appendix A to the petition and is

- ☒ reported at WR-93, 988-02; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

Jurisdiction

This Court has jurisdiction pursuant 28 USCS § 1257(a) and Supreme Ct. R. 13, to review the final judgment rendered by the Texas Court of Criminal Appeals (CCA), the highest court in the state in which a decision could be had regarding Tr. Ct. No. D-1-DC-13-300630-A. This Writ of Certiorari is timely filed with the clerk of this court, within 90 days after entry of the Texas CCA October 30, 2025, white card judgment, which "denied without written order the application for writ of habeas corpus".

RELEVANT CONSTITUTION, RULES AND PROCEDURES

USCS Const. Amend. 5 - CRIMINAL ACTIONS - PROVISIONS CONCERNING – DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSE.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation.

USCS Const. Amend. 6 - RIGHT OF THE ACCUSED

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been 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 defense.

USCS Const. Amend. 14 § 1 - CITIZENS OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of 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.

Tex. Const. Art. V, § 12 - JUDGES TO BE CONSERVATORS OF THE PEACE INDICTMENT AND INFORMATION

(a) All judges of courts of this state, by virtue of their office, are conservators of the peace throughout the state.

(b) An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense. An information is a written instrument presented to a court by an attorney for the state charging a person with the commission of an offense. The practice and procedures relating to the use of indictments and information, including their contents, amendment, sufficiency, and requisites, are as provided by law. The presentment of an indictment or information to a court invests the court with the jurisdiction of the cause.

Tex. Penal Code § 22.01 – ASSAULT

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) an offense under subsection (a)(1) is a class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

(1) A person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant ...

Tex. Penal Code § 22.02 - AGGRAVATED ASSAULT

(a) A person commits an offense if the person commits assault as defined in section 22.01 and the person:

(1) causes serious bodily injury to another, including the person's spouse or

(4)

(2) uses or exhibits a deadly weapon

(b) an offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if:

(2) regardless of whether the offense is committed under subsection (a)(1) or (a)(2), the offense is committed:

(B) against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of power or performance of an official duty as a public servant. ...

Tex. Penal Code § 36.06 - OBSTRUCTION OR RETALIATION

(a) A person commits an offense if the person intentionally or knowingly harms or threatens to harm another by an unlawful act:

(1) in retaliation for or on account of the service or status of another as a:

(A) public servant, witness, prospective witness, or informant or ...

Tex. Penal Code § 1.04 - TERRITORIAL JURISDICTION

(a) This state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which he is criminally responsible if:

(1) either the conduct or a result that is an element of the offense occurs inside this state ...

Tex. R. App. P. Rule 33.1 - PRESERVATION OF APPELLATE COMPLAINTS

(a) In general: As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless

the specific grounds were apparent from the context and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

Tex. Evid. R. 201 - JUDICIAL NOTICE OF ADJUDICATIVE FACTS.

- (a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- (b) Kinds of facts that may be judicially noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction or (2) can be accurately and readily determined from sources whose accuracy cannot be questioned.
- (c) Taking notice. The court: (1) may take judicial notice on its own or (2) must take judicial notice if a party request it and the court is supplied with the necessary information
- (d) Timing. The court may take judicial notice at any stage of the proceeding.
- (e) Opportunity to be heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still to be heard. ...

Tex. Code Crim. Proc. Art. 1.14 - WAIVER OF RIGHTS

- (a) The defendant in a criminal prosecution for any offense may waive any rights secured him by law except that a defendant in a capital felony case may waive the right of trial by jury only in manner permitted by article 1.13(b) of this code.
- (b) If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment before the date on which the trial on the merits commences, he waives and forfeits the rights to object to the defect, error or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with article 28.01 of this code.

Tex. Code Crim. Proc. Art. 27.10 - WRITTEN PLEADING

All motions to set aside an indictment or information and all special pleas and exceptions shall be in writing.

Tex. Code Crim. Proc. Art. 28.01 - PRE-TRIAL

Sec. 1. The court may set any criminal case for a pre-trial hearing before it is set for trial upon its merits, and direct the defendant and his attorney, if any of record, and states attorney, to appear the court at the time and place stated in the court's order for a conference and presence is required during any pre-trial proceeding. The pre-trial hearing shall be to determine any of the following matters: (1) Arraignment of the defendant, if such be necessary, an appointment of counsel to represent the defendant, if such be necessary (2) pleadings of the defendant (3) special pleas, if any (4) exceptions to the form or substance of the indictment or information. ...

Tex. Const. Art. I, § 10 - RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

Statement of Case

The circumstances surrounding this case arise from an incident where the parental rights of James Arthur Brown were terminated in a civil suit. On April 3, 2013, three public servants provided a sworn affidavit accusing Brown of threatening them with speech in the hallway outside of the courtroom. See Appendix D, Mem. L. - Appendix F. On May 29, 2013, a grand jury returned a three-count Retaliation indictment alleging Brown had assaulted and aggravated assaulted Joseph, Dyar, and Laney. *ibid.*, Mem. L. - Appendix E. Brown filed two written pro se motions to quash the retaliation indictment, one on September 4, 2013 and another on October 9, 2013, objecting to, among other things, the omission of the harm element, that the indictment failed to charge the commission of the offense, and that the term assault and aggravated assault made the indictment duplicitous. *ibid.*, Mem. L. - Appendix D. At arraignment Brown requested the trial judge (David Crain) to rule on his motions to quash. The special prosecutor (Corby Holcomb) resisted Brown's request and announced he was ready for trial. The attorney in Brown's defense (Frank Ivy) remained mute during arraignment and Judge Crain implicitly refused to rule on Brown's motions. Thereafter, Brown plead not guilty to the charges and waived his right to trial by jury.

At trial the state produced evidence of threatening speech to support its allegations of assault and aggravated assault in retaliation. Subsequent to the state's presentment, Brown moved for an oral motion to quash indictment and the Judge refused to hear him on it. When trial counsel moved for a direct verdict, the trial judge asserted a range of threats were made from assault to murder. On October 23, 2013, the Judge Crain found Brown guilty as charged in the indictment, enhanced the punishment and assessed punishment at 15-years in prison. *ibid.*, Mem. L. - Appendix C.

After trial Ivy filed a new trial motion claiming Brown was suffering from an antisocial personality disorder without raising any defective indictment claims or any ineffective assistance of counsel (IAC) claims. Subsequently, Brown filed a motion for new trial claiming, among other things, Ivy was ineffective for not filing a motion to quash indictment and that the indictment failed to charge an offense. Judge Crain granted Ivy's new trial motion but sometime after January 14, 2014 it was denied by operation of law because Brown refused to be represented by Ivy. *ibid.*, Mem. L. - Appendix B - Exhibit A.

Through appellate counsel (Tanisa Jeffers) Brown filed an Appellant's Brief on the grounds of insufficient evidence, invalid indictment and ineffective assistance of counsel (IAC). He also attached a motion to abate appeal ... to file an out of time motion for new trial pointing to three separate IAC claims to show a conflict denied him effective assistance during the critical stage to

file a motion for new trial. See Appendix D, Mem. L. - Appendix B ground 2-3, Exhibit-B. The Third Court of Appeals (TCA) affirmed the convictions in an unpublished opinion holding the evidence was sufficient to prove threats of assault and aggravated assault and that the record was undeveloped to decide the invalid indictment and IAC claims. See Appendix D, Mem. L., at Appendix A. The TCA also denied the motion to abate.

Following appeal Brown filed a Petition for Discretionary Review (PDR) claiming the evidence was legally and factually sufficient to prove assault and aggravated assault, that Ivy was ineffective for not objecting to the language in the indictment, and that there was a question on subject matter jurisdiction. The Texas Court of Criminal Appeals (CCA) refused the petition.

ARGUMENTS

A.) CAN SUBJECT-MATTER JURISDICTION BE FORFEITED BY COURTS THROUGH A HYBRID REPRESENTATION WAIVER?

1.) SUBJECT-MATTER JURISDICTION - STRUCTURAL ERROR

In the case of structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversals" regardless of the error's actual effect on the outcome. See *Weaver v. Massachusetts*, 582 U.S. 286, 299, 137 S. Ct. 1899 (2017). Also, this court has held when a requirement goes to subject-matter jurisdiction, courts are obligated to consider sua sponte issues that the parties have disclaimed or have not presented. *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S. Ct. 641 (2012) (citing *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781 (2002)). Subject-matter jurisdiction can never be waived or forfeited, and the objection may be resurrected at any point in the litigation. *id.*

If a claim is that an indictment was defective because it failed to charge a necessary element, then the claim is non-jurisdictional. *id.* The 11th Cir. interpreted *Cotton* as jurisdiction is limited to the omission of an element from the indictment. See *United States v. Peter*, 310 F.3d 709, 714 (11th Cir. 2002). In contrast, the 10th Cir. apprehended *Cotton* as to hold that indictment defects are not jurisdictional and this includes both omissions from the indictment, and arguments that the indictment does not charge a crime against the United States. See *United States v. De Vaughn*, 694 F.3d 1141, 1149 (10th Cir. 2012).

i.) Essential Element

The necessity of providing the essential elements of the crime charged and sufficient facts regarding the offense is grounded in the fifth and sixth Amendments to the United States Constitution. The Petitioner urged the Texas Court of Criminal Appeals (CCA) to identify the elements of retaliation, which it described as a "Chinese Menu". See Appendix D, Mem. L. at

pg.4; (citing *Cada v. State*, 334 S.W.3d 766, 770 (Tex. Crim. App.2011)). If it had, it would have found the "harm" element, as provided in section 36.06 of the Texas Penal Code, is omitted from the retaliation indictment. See Appendix D, at Mem. L., Appendix E. This element is statutorily defined, its definition does not change, and it is necessary to give notice of retaliation. See Tex.pen.c. §1.07(a)(25). Courts have uniformly held that the written indictment must contain all essential elements of the crime charged. See *Hamling v. United States*, 418 U.S. 87,117-18, 94 S. Ct. 2887 (1974); cf. *United States v. Shabani*, 513 U.S. 10, 115 S. Ct. 382 (1994); *United States v. Forbes*, 16 F.3d 1294, 1297-98 (1st Cir. 1994); *United States v. Kimberlin*, 18 F.3d 1156, 1159 (4th Cir. 1994); *United States v. Hayes*, 775 F.2d 1279, 1282 (4th Cir. 1985); *United States v. Randle*, 304 F.3d 373 (5th Cir. 2002).

Further, the word "threaten" standing alone made the indictment ambiguous because that "language may be understood by a reasonably well-informed person in two or more different senses." *Hughitt v. State*, 583 S.W.3d 623, 627 n16 (Tex. Crim. App. 2019) (citing *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015) also see Appendix D, Mem. L., pg. 4 citing *Olivas v. State*, 203 S.W.3d 341, 344-47 (Tex. Crim. App. 2006) (interpreting different statute's plain meaning on the use of the word threaten). Thus, the failure of the charging instrument to track the language "harm" failed to allege retaliation under §36.06.

(ii.) Commission of Offense

A rule is jurisdictional "[i]f the legislature clearly states a threshold limitation on a statute's scope shall count as jurisdictional." *Gonzalez*, at 141. This clear-statement principle makes particular since in Texas because if the charging instrument fails to charge a person with the commission of an offense, then it is not an indictment as required by Tex. Const. Art. V, § 12(b) and art. 1, §10, and does not vest any trial court with jurisdiction. See *Teal v. State*, 230 S.W.3d 172, 179 (Tex. Crim. App. 2007). Even if the indictment tracks the language of the statute, it must be accompanied by a statement of facts and circumstances to notify the accused of the charges. See *United States v. Schmitz*, 634 F.3d 1247, 1261 (11th Cir. 2011).

Accordingly, The State's choice of proving the "unlawful act" element does in every since determine what act, conduct, or behavior it will rely on to show a violation of retaliation. Cf. Tex. pen. c. §§1.07(a)(48), (1). The Petitioner contended in his state habeas that "[n]owhere does the indictment allege the unlawful actions were made over the phone, in person, through mannerisms, speech or any other fact which would notify [him] of the State's theory of criminality. See Appendix D, Mem. L., pg. 5 citing *Moore v. State*, 143 S.W.3d 305, 312 (Tex. App. 2004). The three-count retaliation indictment in this case alleges the unlawful acts are assault and aggravated assault in each count. Both terms are statutorily defined. See Tex. pen. c. §§ 22.01 and 22.02.

The joining of retaliation, assault and aggravated assault in a single count is duplicitous. The

Texas CCA was aware of this claim. See Appendix D, Mem. L., pg. 4-5. Since the body of the indictment reads threaten assault and aggravated assault, it is urged the instrument charges retaliatory assault and aggravated assault under §22.01(2),(b)(1) and 22.02 (a)(2),(b)(2)(B), (C), this statutory law is not an unlawful act in violation of law, and it fails to qualify as an offense.

Other courts have "set a distinction between retaliation, assault and aggravated assault, explaining assault requires "threaten another with imminent bodily injury" and that aggravated assault requires the element of "used or exhibited a deadly weapon" during the commission of assault, while retaliation does not. *ibid.* citing *Stephenson v. State*, 255 S.W.3d 652, 658 (Tex. App. 2008). The mental state necessary to satisfy the elements of retaliatory aggravated assault against a public servant is, assault as provided under §22.01, and "cause serious bodily injury" or the "use or exhibit of a deadly weapon." *McCoy v. State*, 932 S.W.2d 720, 722-24 (Tex. App. 1996). Retaliation requires threat to harm but assault by threat and terroristic threat requires imminent bodily injury. *Helleson v. State*, 5 S.W.3d 393, 396 n. 1 (Tex. App. 1999).

(iii.) Territorial Jurisdiction

Further, the clear statement in Tex. Penal Code § 1.04(a)(1) provides the state has jurisdiction over an offense that a person commits by his own conduct if "either the conduct or a result that is an element of the offense occurs inside this state". See *Gidvani v. Aldrich*, 99 S.W.3d 760, 763 (Tex. App. 2003); also *Yates v. State*, 370 S.W.3d 772, 774 (Tex. App. 2012). When reading the affidavit for warrant of arrest Brown is accused of using threatening speech only. However, at the bottom sentence of the affidavit the affiant uses the language "in fear of imminent serious bodily injury" as retaliation. See Appendix D, Mem. L. - Appendix F. This language is distinguishable from assault by threat and aggravated assault. Cf. *Olivas*, at 346, 347 n.31. Thus, the state lacked jurisdiction because not one element of assault or aggravated assault were committed in Travis County, Texas.

(iv.) Objection

If a defendant does not object to a defect, error or irregularity in an indictment before trial, he waives and forfeits the right to object. See Tex. Code Crim. Proc. Art. 1.14 also *Teal*, at 176. Further, motions to set aside indictment shall be in writing. See Tex. Code Crim. Proc. Art. 27.10. Further, a judge must take judicial notice if a party requests it and he is supplied with the necessary information. See Tex. Evid. R. 201(c)(2). Under Tex. Code Crim. Proc. Art. 28.01(1)(2) and (4) the defendant must be present at the arraignment to determine the matters of arraignment, pleadings and exceptions to the form or substance of the indictment. Also see *Neal v. State*, 150 S.W.3d 169, 175 n. 23-25 (Tex. Crim. App. 2004); cf. Appendix D, Mem. L. pg. 3.

In this case Brown filed two timely written pro se motions to quash indictment. See Appendix

D, Mem. L., at Appendix D. This motion specifically objected to, among other things, the omission of the harm element, and the assault and aggravated assault language. At arraignment, acting pro se, he requested the trial judge to rule on them. The special prosecutor argued the indictment was valid and declared he was ready for trial. Subsequently Judge Crain told Brown if the facts were not proved he would be found not guilty. Trial counsel was mute during this preliminary matter.

The proper test to determine if a charging instrument alleges "an offense" is whether ... the trial court (and appellate courts who give deference to the trial court's assessment) and the defendant identify what penal code provision is alleged and is that penal code provision one that vest jurisdiction in the trial court? Teal, at 180. There is only one question that serves this point: Is there an indictment? Cf. Teal, at 183. Obviously, the charging instrument does not charge retaliation, assault and aggravated assault with enough specificity to identify which penal statute the state intends to prosecute. The Petitioner urges that the failure to allege the commission of the charges removed the written instrument from the ambit of article 1.14(b) because this defect rendered it a non-indictment. Cf. *Duron v. State*, 956 S.W.2d 547, 550 (Tex. Crim. App. 1997)

Therefore, it is claimed that the failure to officially charge by indictment is a constitutional error of the third rationale for categorizing errors as structural under *Weaver*. No matter how it is framed the error will lead to a conviction.

2.) HYBRID REPRESENTATION WAIVER - STRUCTURAL ERROR

i.) Hybrid representation

A defendant bears the burden of meeting two standards if he does not preserve a structural error on direct review but raises it later in context of ineffective assistance of counsel (IAC) claims. First, the defendant must show deficient performance - that the attorney's error was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth Amendment." Second, the defendant must show that attorney's error "prejudice the defense." See *Weaver*, at 299-300 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, (1984)). A "violation of the sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." *id.* Under *Strickland*, prejudice means "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, at 694.

Thereby, this point of error is controlled by the first and third category of *Weaver*, which provides, an error is deemed structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protected some other interests", and, that it is deemed structural "if the error always results in fundamental unfairness." *Weaver*, at 295.

This court has rejected the notion of a waiver when the state's decision "fairly appears to rest

primarily on federal law" and does not rely on procedural default as an independent ground. See *Coleman v. Thompson*, 501 U.S. 722, 734-35, 111 S. Ct. 2546, (1991) (abrogated in part by *Martinez v. Ryan*, 566 U.S. 1, 9, 132 S. Ct. 1309, (2012)). On direct the TCA raised a hybrid representation waiver sua sponte to rule Brown's pro se motions to quash indictment claims did not preserve error. See Appendix D, Mem. L., at Appendix A pg. 11n.5.

Clearly the TCA decision rest primarily on trial attorney's assistance with no independent reliance on Tex. R. App. Pro. 33.1(a). As argued above, and realized by the TCA, two timely written pro se motions to quash indictment were filed with the trial court in compliance with articles 27.10 and 1.14(b). What the TCA did not identify is that special prosecutor Holcomb made a prima face showing by his declaration of readiness over Brown's objection to the written instrument and the trial judge failed to resolve the preliminary matter before trial began. Brown had a right to be heard. Tex. R. Evid. 201(e).

Clearly there is a greater risk of unfairness in upholding a hybrid representation waiver than there is in allowing automatic reversal because certain "fundamental" or "basic" rights cannot be waived unless a defendant personally participates in the waiver. See *Ex parte Barbee*, 616 S.W.3d 836, 844 (Tex. Crim. App. 2021) (citing *Gonzalez v. United States*, 553 U.S. 242, 254-55, 128 S. Ct. 1765 (2008)).

ii.) Waiver

Arguably, trial counsel has no authority without defendant's consent to waive his right to be charged by indictment. In other words, the defendant need not surrender control entirely to counsel. See *Barbee*, at 842 (citing *McCoy v. Louisiana*, 584 U.S. 414, 421, 138 S. Ct. 1500, (2018)). If the decision whether to plead guilty, waive counsel, waive jury trial, testify, or appeal are so important that attorneys must seek the client's consent in order to waive the right, then the right to waive notice before making these decisions are equally important. With regards to a grand jury indictment, a "waiver must be made in open court, defendants must be informed of the nature and cause for the accusation, and the court must be satisfied that defendants waive their rights knowingly, intelligently and voluntarily." See *Matthews v. United States*, 622 F.3d 99, 101 (2d Cir. 2010); *United States v. Boskic*, 545 F.3d 69 (1st Cir. 2008) (defendant can waive right to indictment); *United States v. Milestone*, 626 F.2d 264 (3d Cir. 1980) (defendant can consent to amendment of indictment); *United States v. Holt*, 529 F.2d 981 (4th Cir. 1975) (defendant waived ability to challenge sufficiency of indictment because previously consented to amendment); *United States v. Smith*, 945 F.3d 860 (5th Cir. 2019) (defendant waived right to indictment in open court during re-arraignment); *United States v. Prado*, 204 F.3d 843 (8th Cir. 2000) (holding that defendant waived right to indictment by signing telefaxed copy of waiver of indictment and acknowledging right to proceed by information.); *United States v. Brown*, 752 F.3d 1344 (11th Cir. 2014) (guilty plea waived any challenge to indictment). Accordingly, the

Petitioner claims he did not waive his right to be tried by indictment and urges that "an objection which is ample and timely to bring the alleged federal error to the attention of the trial court ... is sufficient to preserve the claim for review." See *Osborne v. Ohio*, 495 U.S. 103, 125, 110 S. Ct. 1691, (1990).

After raising a hybrid representation waiver sua sponte, the TCA decided the record was not sufficiently developed to evaluate trial attorney's alleged failures or why he did not file any pretrial motions, and that Brown failed to identify any pretrial motions that should have been filed. See Appendix D, Mem. L., at Appendix A pg.13. The plain error rule is invoked when the appellant raises an issue on appeal that he failed to preserve in the trial court. E.g., *United States v. Whitfield*, 590 F.3d 325, 347 n.15 (5th Cir. 2009). This rule has equal force in an inverse context where a conviction is unsupported by the plain language of the statute itself. *id.* The Texas CCA should have known rule 33.1(a) was unconstitutionally applied to this particular controversy because it does not provide a hybrid representation waiver. Neal, *supra*. Cf. *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 916 (Tex. Crim. App. 2011) (any court considering "as applied" challenges to a statute must look at the challenger's conduct alone to determine whether the statute operated unconstitutionally). This "error is so obvious that failure to notice it would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" *Whitfield*, *supra*.

iii.) Presumed Prejudice

When a court is evaluating an IAC claim the ultimate inquiry must concentrate on "the fundamental fairness of the proceeding." *Weaver*, at 300. Here, the Petitioner contends his protected autonomy right was 'complete' when the trial court allowed counsel usurp control of an issue within his prerogative, which merits a presumption of prejudice for at least two reasons: the error always results in fundamental unfairness and the right at issue is designed to protect "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Barbee*, at 843; citing *McCoy*, at 1511.

When Brown rejected a two-year plea offer and made an incompetent choice to waive his right to jury trial, available defenses were irretrievably lost in a proceeding which his fate was decided. As a matter of constitutional violation, the trial judge constructively amended the indictment from assault and aggravated assault to included threatening speech over Brown's contemporaneous oral objection to quash. The indictment may not be amended over the defendant's objection. See *Teal*, at 177 n.21; also see *Stirone v. United States*, 361 U.S. 212, 217, 80 S. Ct. 270

(1960); *United States v. Lockhart*, 844 F.3d 501, 514-16 (5th Cir. 2016)(conviction on alternative basis permitted by statute but not charged in indictment); *United States v. Centeno*, 793 F.3d 378, 390-91 (3d Cir. 2015)(found guilty of aiding and abetting assault after the fact not charged in

indictment); *United States v. Hackett*, 762 F.3d 493, 502 (6th Cir. 2014)(conviction based on discharging firearm while indictment only charged caring); *United States v. Phea*, 953 F.3d 838, 842 (5th Cir. 2020)(instructions allowed conviction under "reasonable opportunity to observe" standard instead of actual knowledge charged in indictment).

It was not the appellate court's commission to invent a strategic reason for what Ivy could have followed without regard to what actually happened. Instead of pursuing Brown's only defense, which was to force the state to prove statutory assault and aggravated assault beyond a reasonable doubt, Ivy aligned himself with prosecution to convict Brown. Ivy's representation was more than ineffective, it was a 'constructive denial' of counsel because he failed to subject the prosecution's case to a meaningful adversarial testing. Cf. Appendix D, Mem. L. pg. 5.

It follows, Ivy entered evidence through state's witness that Brown made threats over the phone and used intimidating mannerisms and presented the murder of a DA to show why witnesses fear increased. See Appendix D, Mem. L. pgs. 7-9. The Petitioner showed the Texas CCA that Ivy effectively drove his mother from the stand. See Appendix D, Mem. L. pgs.8-9 Appendix B ground 5 - Exhibit B (motion for new trial ground 7); and (motion to appeal ground 4); cf. *Webb v. Texas*, 409 U.S. 95, 98, 93 S. Ct. 351 (1972). He also pointed in record where Ivy admitted to allowing materially false video evidence to go unchallenged. *ibid*.

In other courts prejudice assumed when record reflects trial attorney affected the ability of the accused to have a fair trial. *Harris v. Reed*, 894 F.2d 871, 875, (7th Cir. 1990) (trial counsel decision not to call any witness where he saw weakness in case); *Sullivan v. Fairman*, 819 F.2d 1382, (7th Cir. 1987) (failure to contact witnesses who's testimony directly contradicted governments principle witness); *Sears v. Upton*, 561 U.S. 945, 130 S. Ct. (2010) (fails to conduct an adequate mitigation investigation); *Rickman v. Bell*, 131 F.3d 1150, 1159 (6th Cir. 1997) (bad faith imputed to defense counsel); *Taylor v. Illinois*, 484 U.S. 400, 409 108 S. Ct. 646 (1988) (compulsory process).

The period for filing a motion for new trial is a critical stage which requires effective assistance of counsel. See *Cooks v. State*, 240 S.W.3d 906, 910 (Tex. Crim. App. 2007). This also includes first appeal as of right. *id.* (citing *Douglas v. California*, 372 U.S. 353, 357, 83 S. Ct. 814, (1963)). The Petitioner highlights his state habeas where he showed his motion to abate appeal to file an ... out of time motion for new trial. See Appendix D, Mem. L. pg. 6. He also attached a copy of his pro se motion for new trial. *ibid.* Mem. L. Appendix B - Exhibit B. In his motions Brown pointed to three separate IAC claims, which he argued, among other things, Ivy failed to object to the indictment.

Preserving error is a systemic requirement which appellate courts should address as justice requires. *State v. Herndon*, 215 S.W.3d 901, 909 (Tex. Crim. App. 2007). The TCA was not entitled to deprive Brown of a new trial by showing that the error was harmless beyond a

reasonable doubt. Weaver, at 299. Both Texas CCA and TCA knew the prerequisites of 33.1(a) were met but did nothing to correct the waivable-only right and arbitrarily forfeited its lack of jurisdiction regarding the "no indictment" theory.

Here, the Petitioner argues the TCA decision under 33.1(a) is unconstitutionally applied. See Appendix D, Mem. L. Appendix A pgs. 15-17. Clearly the record was undeveloped because the TCA generated abuses from public officials at trial through a hybrid representation waiver, which precluded the development of Brown's IAC claims in regard to the indictment, by doing so, it was no longer the spectators of inept defense, it was the cause. See also, 548 us 140, 150 (deprivation of the right to counsel of choice ... qualifies as "structural error"). In fact, Brown raised a valid IAC claim showing Ivy's admissions of guilt over his objection before and during trial. He substantiated his claim with evidence in the trial record and showed prejudice to his constitutional rights to be officially charged by indictment and have effective representation to be heard on the fact that the State lacked jurisdiction.

Furthermore, Ivy did not assist Brown in filing his notice of appeal, which serves as an indication he had no intention to. See Appendix D, Mem. L. pg. 7; (citing Jones v. State, 98 S.W.3d 700, 703 (Tex. Crim. App. 2003)). After painting a bad picture of Brown at trial, in Ivy's new trial motion, he claimed Brown was suffering from an antisocial personality disorder. *ibid.* pgs. 7-8. This ineffective psychiatric assistance came from a psychiatrist who did not testify at trial from a psychological or criminal perspective. Cf. Nobles v. Johnson, 127 F.3d 409, 421 (5th Cir. Tex. 1997). Not once did Ivy suggest the indictment was defective or that his representation was ineffective. It is obviously clear that Ivy was disqualified to represent Brown because his testimony was needed to develop a contested issue regarding his performance at trial. In re Garza, 373 S.W.3d 115, 117-18 (Tex. App. 2012). Circumstances of this magnitude made it irrelevant that Brown continued to be represented by Ivy because he was denied the guiding hand of counsel in his last opportunity to preserve or be heard on his claims. Cf. Robinson v. Norris, 60 F.3d 457, 460 (8th Cir. 1995).

Therefore, when Brown filed the motion to abate, the TCA should have known a potential conflict existed when Ivy's assistance was ineffective in preserving the fairness of trial. Mickens v. Taylor, 535 U.S. 162, 166-68, 122 S. Ct. 1237 (2002).

B.) Miscarriage of Justice- IS BROWN ACTUALLY INNOCENT OF ASSAULT AND AGGRAVATED ASSAULT AS CHARGED IN THE INDICTMENT?

The "fundamental miscarriage of justice exception is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." See Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, (1993) cf. Bousley v. United States, 523 U.S. 614, 620, 118 S. Ct. 1604 (1998). To establish actual innocence, Petitioner must demonstrate that "in light of all evidence," it is more likely than not that no

reasonable juror would have found him guilty beyond a reasonable doubt. *id.*, at 623 Herrera, at 401(citation omitted).

Further, the Petitioner is entitled to a presumption of innocence and may insist that his guilt be established beyond a reasonable doubt. Herrera, at 398 (citing *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, (1970)). It is urged that this instant case provides a constitutional provision to have effect of ensuring against the risk of convicting an innocent person, by affording them the "right to be heard on waivable-only rights". All types of abuse spiraled out of control from this error leading to the conviction of one who is actually innocent.

In the State's Original Answer, it said the applicant failed to meet his burden of proof. See Appendix C pg. 2. The State further argued relief on habeas application should be denied based on the equitable doctrine of laches, that grounds one and two are not cognizable, and that Applicant failed to show actual innocence. *ibid.* pgs. 3, 7 and 8. In the Applicant's Reply to State's Original Answer he showed, at his second point, diligence in pursuing his constitutional claims. See Appendix B. At his third point he suggested an "obvious impediment", at his fourth point he asserts Respondent must prove assault and aggravated assault beyond a reasonable doubt and is judicially estopped from saying otherwise, and at his fifth point Applicant urged his first and second grounds, in his habeas application, are cognizable to prevent a miscarriage of justice.

1.) Judicially Stopped

The answers to whether this particular constitutional violation has been preserved have been ruled on by this court, which held, subject-matter jurisdiction can never be waived or forfeited, and the objection may be resurrected at any point in the litigation. *supra*, Gonzalez and Cotton. The Petitioner has been incarcerated thirteen years arguing these same arguments on subject matter jurisdiction and actual innocence, but the lower courts have been using procedure to defeat that theory, therein, generating abuses to avoid answering the fundamental question, which is: Did Brown commit assault and aggravated assault in retaliation beyond a reasonable doubt?, or, Did the State lack jurisdiction over assault and aggravated assault?

In *Bousley* this court reversed the case to prove actual innocence on use of firearm as charged in the indictment and not carrying. Unlike *Bousley*, Brown preserved structural error, and he was denied due process and equal protection through a hybrid representation waiver. He argues the State is judicially estopped from prevailing on threatening speech to prove retaliation when the indictment reads assault and aggravated assault, it cannot constructively amend the indictment over his objection. The State had its opportunity and due to its miscarriage of justice, it must prove it beyond a reasonable doubt. In light of the threatening speech evidence no reasonable trier of fact would have found Brown guilty of retaliatory assault and aggravated assault under §§ 22.01 and 22.02. *supra*.

2.) Constitutional Violations

The Petitioner produced record from a subsequent civil trial where three Sheriff's Deputies, who were present during the alleged assaults, testified that had he committed a crime they would have arrested him. See Appendix D, Mem. L. pg. 11. It is urged that the deputies' testimonies are newly discovered evidence because it accrued after the convictions. Also, this new evidence was obstructed by the TCA, which denied Brown's motion to abate and held it does not review factual sufficiency. See Appendix D, Mem. L. Appendix A pg. 2 n.2.

i. Bias or Prejudice Judge

A "wrongful conviction falls within the very limited class of cases that represent a structural error subject to automatic reversal." *Bigby v. Dretke*, 402 F.3d 551, 558 (5th Cir. 2005). It is argued that Judge Crain was biased because he had taken position on a waivable-only right in favor of Holcomb. Record shows he failed or refused rule on Brown's pretrial motions to quash, that he constructively amended the indictment over Brown's objection during trial, that he denied a directed verdict asserting the public servants were a "different type of witness" and that a "whole range of threats were made from assault to murder." See Appendix D, Mem. L. pg. 12. This demonstrated Judge Crain could not judge this particular controversy fairly. Therefore, when Holcomb announced he was ready for trial without officially charging Brown with the commission of the offense, and convicted Brown for offenses that were not committed, prejudice should be presumed because Judge Crain found facts in favor of his refusal. Cf. *Ex parte Craft*, 301 S.W.3d 447 (Tex. App. 2009).

Further, A trial judge has discretion to grant or deny a motion for new trial in the interest of justice, but the interest of justice means in accordance with the law. *Herdon*, at 907 n.17. "A defendant can satisfy the prejudice element by proving either that his counsel (1) labored under an actual conflict of interest, see *Strickland*, 466 U.S., at 692, or (2) was subject to a potential conflict of interest which the court was or should have been aware of, and which it failed to address adequately." See *United States v. Pergler*, 233 F.3d 1005, 1009-10 (7th Cir. 2000) also *United States v. Horton*, 845 F.2d 1414, 1418 (7th Cir. 1988) (if defendant gives the trial court notice of the alleged conflict and the trial court fails to inquire into the conflict, a reviewing court will presume prejudice upon a showing of possible prejudice).

The record suggest judge Crain abused his official capacity to institute a wrongful conviction for assault and aggravated assault without any guiding authority to support his verdict. He fostered this wrongful conviction by impeding Brown's IAC claims against Ivy and prevented Brown from having a meaningful appeal. Because the trial judge had "no discretion not to abide by governing law, an erroneous legal conclusion deserves no deference". *United States v. Ladeau*, 734 F.3d 561, 566 (6th Cir. 2013) (citation omitted).

ii.) Selective and Vindictive Prosecutor

Due process violated if prosecutor penalizes defendant for invoking a legally protected right during criminal prosecution. See also *United States v. Meadows*, 867 F.3d 1305, 1311 (D.C. Cir. 2017) (pretrial motion to dismiss the indictment for prosecutorial vindictiveness); also *United States v. Dvorin*, 817 F.3d 438, 455 (5th Cir. 2016) (presumption of vindictiveness examines prosecutor's actions in the context of entire proceedings); *Neal*, at 173 n.9, 10 (citing *United States v. Goodwin*, 457 U.S. 368, 373, 102 S. Ct. 2485, (1982); *United States v. Johnson*, 171 F.3d 139 (2d Cir. 1999) (Good faith gives way to rebuttal presumption); *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 807-12, 107 S. Ct. 2124 (1987) (no probable cause)).

The Petitioner presented a civil suit seeking preliminary injunction, as new evidence, which was filed against Joseph, Dyar, and Laney before trial began. In it he claimed "'expos[ure] to unreasonable risk of injury" from the defective indictment' and that he was "deliberately targeted" for his "disfavored legal status". He had requested the court to dismiss the indictment. See Appendix D, Mem. L. pg.13. Although inartfully phrased, Brown claimed conflicting loyalties called into question the objectivity of Holcomb because the prosecutor knew and worked with his accuser (Joseph) as a DA and that Holcomb violated a Brady rule by presenting false video evidence to bolster Joseph's accusations. *ibid.* Mem. L. pg.13-14-Appendix B - Exhibit B (motion for new trial - ground 13 and motion to appeal - ground 2). Cf. *Ladeau*, at 566. Brown further presented a claim that he was treated differently than the head DA, Rosemary Lehmberg, who was charged with retaliation around the same time but had her indictment dismissed because the harm element was omitted. *ibid.*

There is a "realistic likelihood" that special prosecutor Holcomb was motivated by judge Crain and Joseph. If not, why would a special prosecutor declare he was ready for trial at arraignment, knowing not one element of assault or aggravated assault was committed. Also cf. *Ladeau*, at 566. In Texas, no case shall be dismissed without the consent of the presiding judge. *Smith v. State*, 70 S.W.3d 848 (Tex. Crim. App. 2002). In essence, judge Crain gave Holcomb permission and consent to wrongfully convict Brown based on some special agreement, and by doing this unfavorable act against Brown, Holcomb violated Tex. Code Crim. Proc. Art. 17.151 knowing not one element of assault or aggravated assault were committed. Judge Crain was not going to consent to dismissing the instrument and Holcomb curried favor with the judge who appointed him. This fundamental error undermined confidence in the integrity of the criminal proceeding. Cf. *Young*, at 810.

iii.) IAC Conflict of interest

The Petitioner presented, as new evidence, a state bar grievance. See Appendix D Mem. L. pgs.14-15. His objective was to show the Texas CCA that Ivy actively represented a conflict during the critical stage to file a motion for new trial to avoid sanctions from the state bar. In the

complaint Brown claimed Ivy told his mother she had to take a mental evaluation to be his witness, that he refused to file a motion to quash indictment, that Ivy refused to subpoena the person who produced the video evidence and Brown claimed there was animosity between them. Ivy knew he was disqualified to represent Brown because his testimony was needed to develop these set of facts. E.g. In re Garza, 373 S.W.3d 115, 117-18 (Tex. App. 2012) (citing Tex. R. Prof Conduct 3.08); cf. Garner v. State, 864 S.W.2d 92 (Tex. App. 1993) (citing Mathis v. Hood, 937 F.2d 790 (2d Cir. 1991) (where client filed disciplinary proceeding against appointed counsel, there was an obvious and actual conflict of interest)); United States v. Sanchez-Barreto, 93 F.3d 17 (1st Cir. 1996) (actual conflicts recognized "between an attorney and his client when pursuit of client's interest would lead to evidence of attorney's malpractice.").

Furthermore, a trial court cannot grant a new trial as to the punishment phase only. Herndon, 215 S.W.3d at 907 n.21. Record reflects Judge Crain granted Ivy additional funds after the post-trial expired by operation of law and before appointing Brown an appellate counsel. So, what fractional part did Judge Crain consider granting Ivy additional funds when the motion for new trial had expired by operation of law. Castillo v. State, 739 S.W.2d 280, 294 (Tex. Crim. App. 1987). Around the time Ivy assisted in the wrongful conviction of Brown, the Austin America Statesman newspaper published an article naming Ivy as one of the attorneys in high rotation of appointments in criminal cases with a substantial increase in salary.

This new evidence supports the claim that Ivy aligned himself with the prosecution before trial, that during trial he concedes guilt over Brown's objection, and at post-trial he actively represented a conflict to deny Brown a fair appeal. As argued above, Ivy's representation should be considered a constructive denial of counsel. Absent these abuses above, no reasonable trier of fact would have found Brown guilty of retaliatory assault and aggravated assault.

"When a court without jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception and remain void long after a defendant has suffered their direct force." Peter, at 716. In this case, the Petitioner was convicted for assault and aggravated assault in retaliation by three public officials whom this court now knows conducted themselves unlawfully to wrongfully convict him. Therefore, since these set of laws and facts undermine all that wrong work with new affirmative evidence of innocence, it is urged that a bias judge, a vindictive prosecutor, and a conflict of interest over his expressed objection merit a presumption of prejudice for at least two reasons: the error always results in fundamental unfairness and the right at issue is designed to protect the fundamental legal principle that a defendant must be allowed to make his own choice about the proper way to protect his own liberty.

In conclusion, Brown was denied the right to be heard on the waivable-only right to be charged by indictment. Does our law judge a man, unless it first hears from him personally and knows what he does? See New American Standard Bible (NASB) John 7:51. Clearly by the threshold limitations of the 5th, 6th and 14th Amendment the Tex. Const. art. V, §12(b) and 1 §10

and Tex. Penal Code § 1.04, the state of Texas lacked jurisdiction to prosecute the Petitioner for retaliation, assault and aggravated assault. In retrospect, the lower courts failed to take adequate steps in response to the motions, objections, and representations made to it by the Petitioner and no prospect dilatory was present to justify that failure.

It is overstood in federal and state law that subject-matter jurisdiction can never be waived or forfeited, and an objection may be resurrected at any point in the litigation. Ivy had no authority without Brown's consent to waive his right to be charged by indictment. The lower courts had no authority to convict and hold Petitioner in prison, and deny him the right to be heard on subject-matter jurisdiction based on procedures. "Who cause a person to be indicted by a word, And ensnare him who adjudicates at the gate, And defraud the one in the right with meaningless arguments." NASB Isaiah 29: 2. The record reflects a miscarriage of justice resulted in the wrongful conviction of the Petitioner due to the bias or prejudice conduct of a judge, a selective and vindictive prosecutor, and from an attorney who actively representing a conflict. Absent these errors no reasonable trier of fact would have convicted the Petitioner on assault and aggravated assault because not one element of those offenses were committed.

In a certain city there was a judge who did not fear God and did not respect man. There was a widow in that city, and she kept coming to him, saying, give me legal protection from my opponent.' For a while he was unwilling but afterward he said to himself, 'even though I do not fear God nor respect man, yet because this widow bothers me, I will give her legal protection, otherwise by continually coming she will wear me out.'" See NASB Luke 2-6. The Petitioner suggests he will continue to work diligently to overturn this wrongful conviction. Thus, the Petitioner ask this court to find him actually innocent of assault and aggravated assault and order immediate release because the lower court lacked jurisdiction to prosecute.

FEBRUARY 17, 2026

JAMES A. BROWN

A handwritten signature in dark ink, appearing to read 'James A. Brown', written in a cursive style.