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IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS
AT AUSTIN

CHRISTOPHER RUBIO,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal from the Court of Appeals of the
Fifth District of Texas at Dallas
In Cause No. 05-18-00861-CR

BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW Christopher Rubio, Appellant, and respectfully submits this Brief on the Merits.

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that the facts of the case and the issues raised are such that oral argument will significantly aid this Court's consideration and disposition of his appeal.

STATEMENT OF THE CASE

On July 11, 2018, a Dallas County jury convicted Appellant of capital murder upon a plea of not guilty; the trial court sentenced him to life imprisonment without the possibility of parole. (CR:109). Trial counsel filed a standardized motion for new trial on the same day, which the trial court immediately overruled. (CR:131). On August 10, 2018, newly-appointed appellate (undersigned) counsel filed a motion for leave to file amended motion for new trial with an amended motion for new trial. (CR:140-225, 238-268). On September 21, 2018, the trial court granted the motion for leave to file, conducted a hearing on Appellant's amended motion for new trial, and ultimately denied Appellant's amended motion for new trial. (RR5).

On February 11, 2020, the Court of Appeals for the Fifth District of Texas at Dallas affirmed Appellant's conviction in a published opinion. *Rubio v. State*, 596

S.W.3d 410 (Tex. App.—Dallas 2020, pet. granted). No motion for rehearing was filed. On April 13, 2020, Appellant filed a timely petition for discretionary review, and on July 1, 2020, this Court granted the petition. This brief is timely filed on or before August 17, 2020.

GROUND FOR REVIEW

Did the Court of Appeals resolve a procedural issue relating to the timely filing and hearing of an amended motion for new trial in a manner that conflicts with Courts of Appeals and Court of Criminal Appeals precedent?

STATEMENT OF FACTS

In a mere day-and-a-half State's case resulting in a 12-minute guilty verdict, the State brought some evidence that 20-year-old Appellant shot complainants Elizabeth Adams and James Tewes on May 18, 2016 at Adams' family's townhome. Adams was the mother of Appellant's two children. (RR3:35; RR4:70). Adams and Appellant met in high school (RR3:39); their families lived in neighboring townhomes at the Villa Valencia Townhomes. (RR3:38, 40). Adams moved in with Appellant and his mother, and they were rearing their kids together in Appellant's townhome. (RR3:40). About ten months before complainants' deaths, Appellant and Adams broke up. (RR3:124). Adams, nevertheless, continued to live in Appellant's townhome. (RR3:124-25). Appellant began dating Dana Grove, who also eventually moved into Appellant's townhome. (RR3:43). Adams began dating Tewes, another

high school acquaintance, a few weeks before their deaths, although she usually saw him only at her mother's nearby townhome. (RR3:43-44, 68-69, 84, 101).

On the day of complainants' deaths, Adams arranged to meet Tewes at a dentist appointment for her son. (RR3:44-45, 70). On the same day around noon, he, her mother, and other family members assisted Adams in moving her things out of Appellant's townhome and into her mother's townhome. (RR3:46-47, 51, 71-72, 86-87, 102). Appellant and Dana were asleep upstairs. *Id*. Around 3:30-4:00 p.m., Appellant woke up and began looking for Adams. (RR3:139). He first sought her at her mother's townhome. (RR3:73). Adams' brother answered the door and professed not to know where she and the kids were. (RR3:73). The children were staying with Adams' grandparents who also lived at the Villa Valencia Townhomes. (RR3:40-41, 140). Appellant walked to Adams' grandparents' home, ensured that the children were there, and then walked back to his own townhome. *Id*. He loaded a shotgun and returned to Adams' mother's townhome, walked upstairs, and allegedly shot Tewes through a bathroom door. (RR3:74, 75, 80, 89-90, 92, 111-14). He then allegedly shot Adams in the interior shower area. *Id*. He returned home and, shortly thereafter, surrendered to police. (RR3: 80, 144, 147, 155, 162).

At trial, counsel entered a plea of not guilty on Appellant's behalf. (RR2:5; RR3:17). On July 9, 2018, the morning of jury selection, trial counsel read through

his three-page seventeen-paragraph pre-trial motion over the course of six record pages. (RR2:5-11). He obtained rulings on only two paragraphs: paragraph three (RR2:7) and paragraph six (RR2:8). His pre-trial motion, filed 11 days earlier, contained no citation to law. (CR:103-105). Trial counsel spent an equal amount of time arguing his pre-trial motion as he did admonishing Appellant on the record that there was not much he could do for him at trial: "And I've told you that it's extremely rare—in fact, this is the only time that I can really remember that I have gone to trial on a situation where if you're found guilty, there is not really going to be anything that I can do for you by way of punishment. . . . You know that I hired people to come over and talk to you and evaluate whether or not there is any mental health issues, insanity, anything like that, and talked about other things in regards to video game addiction. I've shaken the trees trying to find something that might be able to be used somehow to help you in this case. You understand that?" (RR2:13).

At the time trial counsel tried Appellant's case, he was in the midst of jury selection in a capital murder case in which the state was seeking the death penalty, *State of Texas v. Khristopher Love*, No. F15-76400, and was trying, as first chair, three non-death penalty capital murder cases during the month of July 2018. (*See*

RR5:51-52;[1] CR:179-225, Forvus printouts of *State v. Love* (No. F15-76400), *State v. Thomas* (F14-39376), *State v. Giles* (F16-24162), and the instant case). With the death penalty trial beginning, "I was trying to take care of some of these cases that had been pending for a while." (RR5:52). He agreed that it is possible that he was reviewing files from other cases during Appellant's trial. (RR5:52).

He also acknowledged that, in furtherance of any defense, he hired one expert who examined Appellant for a limited purpose and, alongside trial counsel, interviewed three people close to Appellant. Trial counsel hired Dr. Kristi Compton to evaluate Appellant's multiple personalities for a limited diagnosis. (RR5:18). He acknowledged that the only scale she used was the dissociative identity scale. (RR5:21). He stated that she had access to all the records and that he did not place limitations on the scales she was able to use. (RR5:21). He did not know why she did not do more broad-based testing. (RR5:22). Trial counsel and Dr. Compton conducted three interviews together—Appellant's mother, grandmother, and girlfriend. (RR5:22). They interviewed his mother, grandmother, and girlfriend only once. (RR5:22). Dr. Compton did not write a report at the time of the case. (RR5:24).

[1]"RR5" refers to the record of the September 21, 2018 hearing conducted on the amended motion for new trial.

Trial counsel did not make an opening statement. (RR3:22). Nor did he cross-examine any State's witness. (RR3:34, 64, 80, 98, 120, 147, 157, 165, 174, 184, 230, 240, 253; RR4:32, 43, 59). Counsel called no one in Appellant's defense. (RR5:52). He successfully objected twice to the testimony of Diana Ortiz, the mother of complainant James Tewes, on the grounds of hearsay and relevance (RR3:31, 34) and then never again.

Trial counsel did not explore multiple mental health arenas that alone or in combination with one another could have yielded an insanity defense, including: (1) multiple personalities as evidence of any illness other than multiple personality disorder or dissociative identity disorder (RR5:26-27), (2) emotional maturity as evidence of stunted brain development (RR5:25-26), (3) ADHD as evidence of stunted brain development (RR5:28-31), (4) the emotional trauma Appellant suffered as a result of the deprivation of basic needs (RR5:31-33), (5) the physical trauma caused by deprivation in combination with untreated diabetes (RR5:33-35), (6) the epigenetic connection between his mother's hypoxia and genetic malformations to him (RR5:31-36), (7) the link between childhood neglect and poverty and PTSD (RR5:35-38), (8) psychosis (RR5:37-40), and (9) whether his desire to curry favor with father figures, fueled by his own father's rejection, might

have led him to acquiesce to police and trial counsel's case theories and "strategies." (RR5:39).

Trial counsel testified that he approached the prosecution "30 or 40 times" about a settlement. (RR5:44). But he did not offer the prosecutor any mitigating context or reason to settle other than that Appellant was a "troubled kid, he had a bad time, went through a bad situation." (RR5:45). He did not know "what of [Appellant's] mitigation she was aware." (RR5:46).

During closing argument, trial counsel highlighted the facts surrounding the offense and effectively conceded guilt:

> You've been here for the last few days and seen a trial unlike any trial that you will probably ever see if you were called down here for the rest of your lives to be on jury duty. . . .[I]n the voir dire process . . . I couldn't stand before you and tell you about how bad the facts of the case were going to be that you were going to hear. . . . So as we sat here this week, I didn't insult your intelligence by questions in regards to things that weren't going to be important. . . . Certainly, as I stand here before you, you've seen the evidence. I'm not going to stand here and make a mockery of common sense and reason and talk to you about how it's a shame that in a situation like this, you only get to hear part of the case regarding the thing that Christopher Rubio is accused of doing. . . . So as I stand before you, I will charge you to do just exactly what we spoke about in the voir dire process, is you go back there, use your reason and your common sense . . . and you arrive at a verdict that you think is appropriate in this case. (RR4:65-66).

(RR4:64-66). Appellant's jury returned a verdict in less than 12 minutes. (RR4:70). On the same day as sentencing, trial counsel filed a pre-printed, standardized motion for new trial, which the trial court overruled. (CR:131).

SUMMARY OF ARGUMENT

Appellant argues that the court of appeals should have considered the record of the September 21, 2018 motion for new trial hearing in its disposition of Appellant's points of error on appeal relating to ineffective assistance of trial counsel. The trial court exercised its inherent power to change its first ruling overruling Appellant's pre-printed motion for new trial and conduct a hearing on Appellant's amended, merits-based motion for new trial during the pendency of its plenary jurisdiction, consistent with the law from this Court and many courts of appeals, as well as policy justifications.

ARGUMENT

In its analysis of several appellate claims of ineffective assistance of counsel, the Court of Appeals excluded all evidence that the parties developed in a motion for new trial hearing on the ground that the trial court erred in hearing Appellant's amended motion for new trial. In accordance with Court of Criminal Appeals' decisions, Appellant argues that, before the expiration of the trial court's plenary jurisdiction (when the record is filed in the appellate court), the trial court's last

ruling on a motion for new trial should stand. Appellant asserts that the Dallas Court of Appeals should have considered the trial court's final ruling and all items and hearings upon which it based its final ruling.

On July 11, 2018, the date of judgment, trial counsel filed a standardized motion for new trial on a pre-printed court form. (CR:131). The trial court overruled his motion on the same day. (CR:131). Appellant, through newly-appointed appellate (undersigned) counsel, filed a motion for leave to file amended motion for new trial and an amended motion for new trial on August 10, 2018, within the 30-day time period following judgment. *See* Tex. R. App. P. 21.4~~;~~ (CR:144). On September 14, 2018, five weeks after Appellant filed the amended motion for new trial and on the day the motion was first set for a hearing, the State objected to Appellant's filing. (CR:235; RR5:5-6). The State argued that because the trial court overruled trial counsel's standardized motion for new trial, which was filed and overruled on the date of judgment, the trial court could not later hear Appellant's timely amended motion for new trial filed within the initial 30-day time period following judgment. *Id*. On September 21, 2018, the trial court denied the State's objections, agreed to hear the amended motion for new trial, conducted a hearing, and ultimately denied the amended motion. (RR5:5-6, 84).

The Court of Appeals nevertheless agreed with the State's objections (and subsequent cross-point on appeal) and affirmed Appellant's case based, in part, on the following erroneous premises: (1) that the rules of appellate procedure prohibit a trial court from hearing a second motion for new trial after it has overruled a preceding motion for new trial; (2) that the only exception to the first premise is when a trial court rescinds in writing a previous order granting a motion for new trial, and (3) that Appellant is required to file a written motion to rescind the order denying his motion for new trial. There is no precedent for the court of appeals' holding in this case. The Dallas court grafted new rules onto the plain language of the rules of appellate procedure. It effectively held that, under the rules, the overruling of a motion for new trial terminated any possible relief on a motion for new trial without regard to the trial court's subsequent actions or plenary jurisdiction. It seems to make an alternative holding that a written motion to rescind accompanied by a written rescission is the only possible procedural avenue for relief, an avenue for relief available only for a previous grant. There is no rules-based, statutory, or common law precedent for terminating the trial court's plenary jurisdiction or limiting the avenue for relief to a trial court's written ruling on a motion to rescind.

THE TRIAL COURT RETAINED AUTHORITY TO CHANGE ITS RULING UNTIL THE FILING OF THE RECORD SHIFTED JURISDICTION.

A. Case law from Court of Criminal Appeals

A trial court has the inherent power to vacate, modify, or amend its own rulings within the time of its plenary jurisdiction. "In other words, so long as the court does not by its ruling divest itself of jurisdiction or exceed a statutory time table, it can simply change its mind on a ruling. The ability to do so is a necessary function of an efficient judiciary." *Awadelkariem v. State*, 974 S.W.2d 721, 727 (Tex. Crim. App. 1998) (Meyers J., concurring). Thus, a trial court's initial ruling denying a motion is not fixed and absolute, barring a statutory prohibition or the loss of jurisdiction; a trial court may subsequently change its own ruling. *Gutierrez v. State*, 979 S.W.2d 659, 664 (Tex. Crim. App. 1998) (Meyers J., concurring).

When a motion for new trial is filed, that plenary jurisdiction extends to at least 75 days from the date sentence is pronounced in open court, and in some circumstances, beyond 75 days. *See* Tex. R. App. P. 21.8(a); *State v. Davis*, 349 S.W.3d 535, 538 (Tex. Crim. App. 2011) (holding that trial court had authority to set aside original sentence, and modified judgment was not void when defendant had filed motion to reconsider his sentence, which was functionally indistinguishable from motion for new trial on punishment, within thirty days of his initial sentence).

In *Awadelkariem v. State*, 974 S.W.2d 721, 728 (Tex. Crim. App. 1998), the Court held that a trial court may modify its order on motion for new trial within the seventy-five days provided by the rules. And in *Kirk v. State*, 454 S.W.3d 511, 515 (Tex. Crim. App. 2015), the Court extended the trial court's power to change an order on a motion for new trial beyond the 75-day time limit. Further, a timely and sufficient notice of appeal extends the trial court's jurisdiction to act on its judgment until the filing of the record in the appellate court. *See* Tex. R. App. P. 25.2(g); *State v. Moore*, 225 S.W.3d 556, 569 (Tex. Crim. App. 2007).

The Court did not limit *Awadelkariem's* and *Kirk's* holdings to circumstances in which a trial court grants a motion for new trial and then rescinds its order in writing. As the Dallas court of appeals acknowledged in footnote four, the *Awadelkariem* court expressly held that a trial court may rescind "an order granting *or denying* a motion for new trial . . . so long as such action occurs within the 75 days provided by the rules." *Rubio*, 2020 WL 633681, at *4, fn. 4 (citing *Awadelkariem*, 972 S.W.2d at 728) (emphasis added). It also acknowledged that *Kirk* abolished any time limit on the trial court's power to rescind the granting of a new trial. *Id*. (citing *Kirk*, 454 S.W.3d at 511). Nor has the Court required that the trial court memorialize all rescissions in writing.

B. Case law from Dallas court of appeals and sister courts of appeals

The *Rubio* court focused on an outdated line of reasoning in asserting that the rules of appellate procedure prohibit a trial court from hearing a timely-filed amended motion for new trial following any ruling on an earlier-filed motion for new trial.[2] *See Rubio*, 596 S.W.3d at 419-20. Even the Dallas court of appeals has previously acknowledged that a trial court may, during its plenary jurisdiction, freely rescind a grant or denial of a motion for new trial. In *Hopkins v. State*, No. 05-02-01804-CR, 2003 WL 21508760, at *1 (Tex. App.—Dallas, July 2, 2003, no pet.) (not designated for publication), a 2003 pre-*Kirk* case, the Dallas court acknowledged that, in accordance with Rules 21.4 and 21.8 of the Rules of Appellate Procedure, any motion for new trial was due within thirty days of sentencing, and any affirmative ruling was due within 75 days of sentencing. *Id*. (citing *Awadelkariem*, 974 S.W.2d at 727). "Moreover, a trial court may freely rescind its order granting or denying a motion for new trial as long as that action is taken within the seventy-five day period provided by the rules." *Id*. (citing *Awadelkariem*, 974

[2]The Dallas Court of Appeals cited cases dating back 20 years, applying an interpretation of an older rule that preceded Texas Rule of Appellate Procedure 21.4, and having either no petition history or no publication designation: *Starks v. State*, 995 S.W.2d 844 (Tex. App.—Amarillo 1999, no pet.); *Else v. State*, No. 05-99-00238-CV, 2000 WL 566962 (Tex. App.—Dallas Apr. 28 2000, pet. ref'd) (not designated for publication); *Springstun v. State*, No. 14-98-01455-CR, 2001 WL4912-4 (Tex. App. Houston [14th Dist.] May 10, 2001, no pet.) (not designated for publication).

S.W.2d at 727). "However, once that seventy-five day period passes, the order granting or denying a new trial becomes final and the trial court may not rescind it." *Id*. More recent Dallas case law, consistent with *Hopkins*, indicates that once a trial court denies a timely-filed motion for new trial, a defendant may no longer file an amended motion for new trial absent an affirmative action by the trial court, such as a rescission of its previous ruling. In *Castillo-Diaz v. State*, the Dallas court of appeals acknowledged that "[t]he trial court's plenary jurisdiction to rescind its order denying the motions for new trial extended for seventy-five days following imposition of appellant's sentence" and that without any action to move the amended motion for new trial forward, such as a ruling on a motion to rescind, the trial court made no appealable rulings related to the amended motions for new trial. *Castillo-Diaz v. State*, No. 05-17-00644-CR, 2018 WL 5291979, at *3 (Tex. App.—Dallas Oct. 25, 2018, no pet.) (not designated for publication) (noting that trial court never ruled on Appellant's motions to rescind and that "[b]ecause the trial court never granted the motions to rescind its previous order granting appellant's motions for new trial, the trial court had no reason to consider the amended motions for new trial"); *see Awadelkariem*, 974 S.W.2d at 728; *see also Baxley v. State*, No. 05-96-00684-CR, 2000 WL 781428, at *2 (Tex. App.—Dallas June 20, 2000, no pet.) (not designated for publication) (noting that because appellant timely filed amended

motion for new trial within 30-day window, trial court could rescind its original order denying original motion for new trial, filed on the date of judgment, and hear the first amended motion for new trial).

Sister courts also indicate a conflict with the Dallas court of appeals' instant holdings in *Rubio*, particularly concerning the trial court's freedom to change its ruling on a motion for new trial during its plenary jurisdiction: *see Stepan v. State*, 244 S.W.3d 642, 644-46 (Tex. App.—Austin 2008, no pet.) (holding that order granting or denying a motion for new trial may be freely rescinded so long as such action occurs within the 75 days provided by the rules); *Meineke v. State*, 171 S.W.3d 551, 555-56, 558 (Tex. App.—Houston [14th] 2005, pet. ref'd) (holding that, "[S]o long as the court does not by its ruling divest itself of jurisdiction or extend a statutory time table, it can simply change its mind on a ruling. The ability to do so is a necessary function of an efficient judiciary" (citation omitted) and "A trial court can—in the interest of judicial economy—exercise its plenary power and take actions necessary to correct, modify, vacate, or amend its rulings" (citations omitted)); *Townley v. State*, No. 02-17-00046-CR, 2018 WL 4924943, at *1–4 (Tex. App.—Ft. Worth Oct. 11, 2018, pet. ref'd) (not designated for publication) (holding that "trial court had the power to freely rescind its order granting a new trial and therefore did not abuse its discretion by doing so"); *Bindock v. State*, No. 04-17-

00643-CR, 2018 WL 3039918, at *1-2 (Tex. App.—San Antonio June 20, 2018, pet. ref'd) (not designated for publication) (holding that "regardless of the reason for the trial court's decision to enter the nunc pro tunc order in the instant case or the credibility of the stated reason, the trial court had the authority to enter the nunc pro tunc order rescinding its order granting the new trial"); *State v. Barron*, No. 08-12-00245-CR, 2014 WL 50549, at *2 (Tex. App.—El Paso Feb. 7, 2014, pet. ref'd) (not designated for publication) (noting that "once the trial court has overruled a timely-filed motion for new trial, the defendant may not file another motion for new trial during the thirty-day primary period established by Tex. R. App. P. 21.4 *without leave of court*") (emphasis added); *Motley v. State*, No. 01-07-00517-CR, 2008 WL 5102340, at *5 (Tex. App.—Houston [1st] Dec. 4, 2008, pet. ref'd) (not designated for publication) (holding that a trial court may freely rescind any order on a motion for new trial as long as the rescission occurs while the trial court retains plenary power); *Silguero v. State*, No 13-01-860-CR, 2005 WL 3214849, at *3 (Tex. App.—Corpus Christi-Edinburg Nov. 30, 2005, pet. ref'd) (not designated for publication) (noting that "[a] defendant may file an amended motion for new trial *without leave of the court* if the amended motion is both timely and filed before the court overrules any preceding motion for new trial") (emphasis added); *Campbell v. State*, No. 04-03-00295-CR, 2004 WL 839634, at *2 n.2 Tex. App.—San Antonio Apr. 21, 2004,

no pet.) (not designated for publication) (noting that because the court could rescind its order denying Campbell's original motion for new trial, it could properly consider Campbell's "first amended motion for new trial or, in the alternative, second motion for new trial" (citation omitted)).

In *Porter v. State*, the First District Court of Appeals considered circumstances like Appellant's in the context of a motion to abate. *Porter v. State*, No. 01-17-00534-CR, 2018 WL 3581082, at *9 (Tex. App.—Hous. [1st. Dist.] July 26, 2018), *opinion withdrawn and superseded on denial of reh'g*, No. 01-17-00534-CR, 2018 WL 4169482 (Tex. App.—Hous. [1st Dist.] Aug. 30, 2018, pet. ref'd). The Dallas court of appeals appears to have distinguished *Porter* on the ground that its procedural posture, a motion to abate, is not the same as Appellant's, an amended motion for new trial. *Porter* does, however, expressly contemplate the viability of an amended motion for new trial in the context of a preceding denial:

> Two days after Porter was sentenced, Porter filed a motion for new trial, which the trial court denied. That same day, trial counsel withdrew, and appellate counsel was appointed in his place. Under the appellate rules, when the trial court denies a motion for new trial, it may later rescind its order, so long as such action occurs within 75 days after the trial court imposes or suspends judgment in open court. *See Awadelkariem v. State*, 974 S.W.2d 721, 728 (Tex. Crim. App. 1998), *overruled on other grounds by Kirk v. State*, 454 S.W.3d 511 (Tex. Crim. App. 2015); *see also* Tex. R. App. P. 21.8(a) (trial court has 75 days after judgment is imposed or suspended to rule on motion for new trial). Thus, once appointed, Porter's appellate counsel had over two months to review the record, identify potential claims of

> ineffective assistance of counsel, develop evidence to support those claims, and file an amended motion for new trial. Because Porter was afforded sufficient time to develop the record before the expiration of the trial court's plenary power, we deny his motion to abate.

Porter, 2018 WL 3581082, at *9. And in *Motley v. State*, the same court upheld the trial court's constructive rescission when, on the 75th day after imposing sentence, the trial court granted defendant's motion for new trial, immediately thereafter granted the State's motion to reconsider, and then changed its order. *Motley*, 2008 WL 5102340, at *5.

THE TRIAL COURT'S AFFIRMATIVE ACTIONS CONSTITUTED A RESCISSION OF ITS RULING ON THE FIRST MOTION FOR NEW TRIAL FOLLOWED BY A RULING ON THE SECOND MOTION FOR NEW TRIAL.

The court of appeals effectively shifted the onus of making a specific type of record of the rescission from the State to Appellant. But Appellant is not seeking relief from the trial court's decisions to reconsider its ruling on the boilerplate motion for new trial and conduct a hearing on the merits of the amended motion for new trial. It is Appellant's position that the trial court's affirmative actions in this case effected a rescission of her earlier ruling and the opportunity to rule on a merits-based motion for new trial. The same trial judge who heard every proceeding in this case agreed to hear the motion for leave to file amended motion for new trial and amended motion for new trial. The first motion for new trial was non-substantive—

it had no merits-based or as-applied argument. (CR:131). Its sole purpose was procedural: to garner additional time for the court reporter to file the record. *See* Tex. R. App. P. 35.2(b) (stating appellate record is due within 120 days of sentencing if motion for new trial filed). Appellant's amended motion for new trial was the first substantive motion for new trial, and Appellant filed it timely, within 30 days of judgment. (CR:144). The motion for leave to file amended motion for new trial was effectively a motion for reconsideration of her prior ruling in light of the newly-developed evidence. The trial court understood this to be the request and granted the motion for leave to file an amended motion for new trial. Its decision to reconsider effectively rescinded the prior ruling by operation of law.[3] The rescission of the trial court's previous ruling became manifest when the trial court set a hearing on the amended motion for new trial twice (once on September 14, 2018 and again when she reset it to September 21, 2018); it became manifest with the denial of the State's objections on September 21st; and it became manifest when, rather than forcing Appellant to put evidence on as a bill, the trial court allowed a merits hearing. When the trial court denied the amended motion for new trial at the conclusion of the hearing, she made an appealable ruling. (*See* RR5:5-6, *passim*, 84).

[3]The Rules of Appellate Procedure limit any requirement that a trial court rule on a motion for new trial in writing to orders granting motions for new trial. *See* Tex. R. App. R. 21.8(b).

POLICY JUSTIFICATIONS, SUCH AS JUDICIAL EFFICIENCY, SHOULD COMPEL THE COURT OF APPEALS' CONSIDERATION OF ALL OF THE EVIDENCE BEFORE IT.

Just as importantly, there are policy justifications for reviewing Appellant's claims of ineffective assistance of trial counsel with the evidence developed at the motion for new trial hearing rather than requiring Appellant to re-litigate all of his claims in a habeas proceeding. There is no justification for allowing a ruling on a pre-printed motion for new trial, filed within minutes of sentencing, to curtail a person's ability to litigate a merits-based motion for new trial with a willing trial court during the trial court's plenary jurisdiction. In fact, Appellant would argue that any ruling on a pre-printed motion for new trial is not a merits ruling, particularly in this case; the first motion should have had no effect on the merits deadline.

Rule 2 of the Texas Rules of Appellate Procedure authorizes an appellate court to suspend a rule's operation in a particular case and order a different procedure to expedite a decision or for other good cause. In this case, it would be a waste of judicial and taxpayer resources to impose Rule 21.4 in a manner consistent with the Dallas court of appeals' interpretation and require Appellant to, again, bring his claims of ineffective assistance of trial counsel in a habeas proceeding and develop the record. The *Oldham* court noted a number of cases in which policy considerations influenced the exercise of Rule 2 (formerly Rule 2(b)). *Oldham v.*

State, 977 S.W.2d 354, 357 (Tex. Crim. App. 1998) (citing, in part, *Callis v. State*, 756 S.W.2d 826 (Tex. App.—Houston [1st Dist.] 1988, no pet.) (using Rule 2(b) to abate appeal and remand to allow untimely filing of a motion for new trial upon finding the appellant was denied counsel during time limit to file motion for a new trial); *McMillan v. State,* 769 S.W.2d 675 (Tex. App.—Dallas 1989, pet. ref'd) (using Rule 2(b) to suspend time limits to file a notice of appeal after case remanded for a hearing on a motion for a new trial); *Boulos v. State,* 775 S.W.2d 8 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd) (using Rule 2(b) to allow untimely motion for extension of time to file late notice of appeal); *Harris v. State,* 827 S.W.2d 442 (Tex. App.—San Antonio 1992, no pet.), and *Harris v. State,* 818 S.W.2d 231 (Tex. App.—San Antonio 1991) (using Rule 2(b) to abate the appeal and remand for an out-of-time motion for new trial based on newly discovered evidence); *State ex rel. Holmes v. Shaver*, 824 S.W.2d 285 (Tex. App.—Texarkana 1992) (using Rule 2(b) to abate the appeal and remand to the trial court to conduct a rehearing on out-of-time motions for new trial); *Sanchez v. State,* 885 S.W.2d 444 (Tex. App.—Corpus Christi 1994, pet. ref'd) (using Rule 2(b) to allow untimely motion for extension of time to file late notice of appeal); *Hilton v. State,* 870 S.W.2d 209 (Tex. App.—Beaumont 1994, no pet.) (abating appeal and remanding to the trial court for a hearing to allow the appellant to attempt to establish good

cause under Rule 2(b) to allow an out-of-time motion for new trial); *Tuffiash v. State*, 878 S.W.2d 197 (Tex. App.—San Antonio 1994, pet. ref'd) (using Rule 2(b) to abate the appeal and remand to the trial court for an out-of-time motion for a new trial based on newly discovered evidence, conceding that such claim is also cognizable in habeas)).

Further, Appellant is indigent and may not again have counsel to pursue his claims in a habeas proceeding. Judge Alcala fully explicated this inequity in *Ex parte Garcia*, 486 S.W.3d 565 (Tex. Crim. App. 2016) (mem op.) (Alcala, J., dissenting), and *Griffith v. State*, 507 S.W.3d 720 (Tex. Crim. App. 2016) (Alcala, J., dissenting):

> Instead of addressing this problem, some people will pivot and rationalize that Texas is doing better than we used to do at providing counsel for indigent defendants. Other people will continue to pivot and rationalize, arguing that Texas spends a lot of money providing counsel for indigent defendants. And others will pivot by proclaiming that many claims should be litigated during the motion for new trial stage and that habeas attorneys must be educated and qualified to represent indigent applicants. Of course, all of those rationalizations are true, but they miss the point. The point is that indigent defendants in Texas ordinarily do not have a viable procedural avenue for challenging the ineffectiveness of their trial attorneys. This is a problem that is unique to the poor in Texas because affluent people, who can afford to hire habeas counsel, have an adequate procedural avenue for challenging the ineffectiveness of trial counsel through post-conviction habeas applications. [Footnote omitted]. A poor person, of course, like a rich person, can file his habeas application challenging his trial attorney's ineffectiveness, but he will almost certainly fail because, as a pro se litigant, he is likely unversed in the pleading and proof requirements for obtaining habeas relief. *See Ex parte Garcia*, 486 S.W.3d 565 (Tex. Crim. App. 2016) (mem. op.) (Alcala, J., dissenting); *see also Martinez v. Ryan*, 566 U.S.

> 1, 132 S. Ct. 1309, 1317–18, 182 L.Ed.2d 272 (2012) (observing that, "[w]ithout the help of an adequate attorney, a prisoner will have [ ] difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim" on post-conviction review; thus, a post-conviction proceeding, "if undertaken without counsel ... may not have been sufficient to ensure that proper consideration was given to a substantial claim"). In contrast, a person who can afford a post-conviction habeas attorney to navigate that procedural scheme will have a reasonable forum to challenge the effectiveness of his trial attorney.

Griffith, 507 S.W.3d at 724–25 (Alcala, J., dissenting). Appellant is in the same position as any indigent appellant. He will not be assured counsel in any habeas proceeding to litigate his meritorious claims of ineffective assistance of trial counsel.

There is significant discourse concerning the practical problems of delaying claims of ineffective assistance of trial counsel. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 695 (2007). The decision to locate ineffective assistance of counsel claims in collateral review proceedings undermines the appellate attorney's role: "Rather than waste time and resources requiring appellate counsel to file *Anders* motions or brief frivolous issues in these cases, appellate attorneys' time would be better spent investigating and briefing trial counsel's ineffectiveness in appropriate cases." *Id*. at 704; *see also id*. at 708 (proposing that "time provided for filing the motion for a new trial would have to be extended. . . . at least six months

from the date the transcripts are complete"). It would pose a further inequity to delay Appellant's claim when there is an available record before the reviewing court.

It is Appellant's position that the Fifth District Court of Appeals' published decision conflicts with other courts of appeals' decisions and applicable decisions of this Court; the court of appeals also appears to have misconstrued a rule and/or grafted new requirements upon Texas Rule of Appellate Procedure 21. *See* Tex. R. App. P. 66.3(a), (b), (c), (d), (f). Accordingly, this Court should reverse the lower court and remand for a reconsideration of his appeal with the evidence adduced at the hearing on Appellant's amended motion for new trial or reverse for a new trial.

PRAYER FOR RELIEF

For the reasons herein alleged, Appellant prays that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2020, a true copy of the foregoing petition was served by electronic delivery to the Dallas County Criminal District Attorney's Office at DCDAAppeals@dallascounty.org and Stacey M. Soule, State Prosecuting Attorney, at Stacey.Soule@spa.texas.gov.

Christi Dean

CERTIFICATE OF COMPLIANCE

I hereby certify that the word count in this document, which is prepared in Microsoft Word 2010, is 6,992.

Christi Dean

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