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COURT OF CRIMINAL APPEALS
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CAUSE NO. PD-1037-16

IN THE TEXAS COURT OF CRIMINAL APPEALS
STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/28/2017
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STATE OF TEXAS, Appellant

V.

REINALDO SANCHEZ, Appellee

APPEAL OF TRIAL COURT CASE NO. 13-15-00288-CR
FROM THE THIRTEENTH COURT OF APPEALS
STATE OF TEXAS

APPELLEE'S BRIEF ON DISCRETIONARY REVIEW

Victoria Guerra
3219 N. McColl
McAllen, TX 78501
(956) 618-2609
(956) 618-2553 (fax)
State Bar Number: 08578900
Attorney for Appellee

STATEMENT REGARDING ORAL ARGUMENT

Even though this Court granted Appellant's Petition without oral argument, the Appellee submits that oral argument may be helpful and enlightening to this Court. As such, Appellee requests oral argument.

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STATEMENT OF THE CASE

By way of indictment dated September 24, 2014, Appellee Reinaldo R. Sanchez, Jr. ("Mr. Sanchez") stands charged with possession of a controlled substance (cocaine) in an amount of four grams or more but less than 200 grams, a first degree felony. C3.

Mr. Sanchez filed a motion to suppress on June 11, 2015. C10.

A hearing was had on Mr. Sanchez's motion to suppress on June 24, 2015. 2R.

The Trial Court denied the motion to suppress as to evidence found on Mr. Sanchez but granted the motion to suppress as to evidence found in the vehicle. C6, 18.

The Appellant, the State of Texas, filed its notice of appeal on June 29, 2015 (C19) and requested findings of fact and conclusions of law on July 1, 2015. C24.

The District Court entered findings and conclusions on July 24, 2015. SC3.

The Thirteenth Court of Appeals upheld the decision of the District Court. *State v. Sanchez*, 501 S.W.3d 165 (Tex. App.—Corpus Christi 2016, pet. granted).

RESPONSIVE ISSUES PRESENTED

ISSUE ONE: The Appellant has waived her arguments.

ISSUE TWO: The Thirteenth Court of Appeals properly interpreted *Arizona v. Gant* by applying the totality of the circumstances when determining the validity of the search incident to arrest.

ISSUE THREE: The Thirteenth Court of Appeals' decision and judgment are correct.

STATEMENT OF THE FACTS

On or about April 26, 2014, around 5:12 a.m., McAllen Police Department patrol officer Mariel Martinez traveled east on Nolana when she saw a stationary jeep in a grassy area east of Kohnami's, a bar and grill establishment. 2R14–15. The driver's side of the jeep was wide open. 2R14. It was a little suspicious because there were recent several burglary of vehicles in the area. 2R14. When Officer Martinez approached the vehicle and saw that someone was in it, she called for backup. 2R17. When the backup Officer O.T. DeLeon arrived, Officer Martinez approached Mr. Sanchez's vehicle—it did not take much to wake him up. 2R18. Mr. Sanchez gave his name to Officer Martinez and admitted that he had traffic ticket warrants for his arrest. 2R20–21. Officer Martinez ran Mr. Sanchez's name through dispatch and confirmed that Mr. Sanchez had outstanding warrants for his arrest. 2R21. Officer Martinez placed Mr. Sanchez under arrest (2R28) and handcuffed him behind his back (2R21, 29), but did not place him in the patrol car. 2R30. Officer Martinez conducted a search of Mr. Sanchez incident to arrest for her safety, to make sure that Mr. Sanchez did not have a weapon, contraband, drugs, etc. 2R22. Officer Martinez found a cigarette box in one of Mr. Sanchez's pockets. 2R22. Officer Martinez testified that she had reason to believe that a weapon might be inside the cigarette pack such as a pistol or knife. 2R37. She

opened it, pulled out the cigarettes and saw two little baggies containing white powdery substance which appeared to be cocaine. 2R22–23. Officer Martinez testified that during the search of his person, Mr. Sanchez stared fixedly at his vehicle. 2R23. Officer Martinez testified that she was concerned for officer safety, or that Mr. Sanchez was going to run from her or grab something from his reach such as weapons or contraband, or that there was further evidence of the crime in the vehicle. 2R24. Officer Martinez did not obtain a warrant and did not seek consent to search Mr. Sanchez's vehicle. 2R46. She proceeded to search the vehicle. During the vehicle search, Officer Martinez picked up a dark t-shirt and a Nintendo DS pouch immediately fell out. 2R25. The pouch was slightly open and Officer Martinez was able to see another clear plastic baggy inside the pouch. 2R25. The Nintendo pouch was within Mr. Sanchez's reach when he was sitting inside his vehicle. 2R25. The plastic bag inside the pouch contained a white powdery substance similar to what was found on Mr. Sanchez's person. 2R26. A field test of the powdery substance yielded positive results for cocaine. 2R26. Mr. Sanchez was then transported to the jail and charged with possession of controlled substance. 2R27.

Mr. Sanchez denies that the search of his person was proper. Mr. Sanchez denies that the search of the vehicle was proper.

SUMMARY OF THE ARGUMENT

Mr. Sanchez was arrested for traffic warrants. He was not arrested for the cocaine found on his person until after he was transported to the police station. The Appellant has forfeited and waived his arguments that *Rawlings* and *Davenpeck* do not require that Mr. Sanchez be informed of the reason for his arrest and that consideration of the totality of the circumstances renders the search of the vehicle valid under the Fourth Amendment. *See* TRAP 33.1(a).

The Appellant failed to challenge Conclusion of Law No. Three which provides that the "officer did not have probable cause to believe that the vehicle contained evidence of a crime before the search of the Defendant's vehicle. The Court of Appeals ruled that the Appellant's failure to challenge this conclusion constituted a waiver of all of the Appellant's challenges to the District Court's and Court of Appeals' decisions. *See* TRAP 38.1(f) and (i).

Lastly, the District Court's findings and conclusions were based upon arguments presented by the parties at the suppression hearing. The State insisted that the automobile exception to the warrant requirement required an analysis of *Gant's* wingspan holding. However, the Appellant altered its presented arguments that she made to the District Court in the Court of Appeals and before this Court.

Said arguments are forfeited and waived. *See* TRAP 33.1(a) and TRAP 38.1(f) and (i).

Alternatively, and without waiving the foregoing, the Court of Appeals properly interpreted *Arizona v. Gant* by applying the totality of the circumstances when determining the validity of the search incident to arrest. The Court of Appeals' decision and judgment are correct.

ARGUMENT

Standard of Review: A reviewing court reviews a trial court's ruling on a motion to suppress for abuse of discretion using a bifurcated standard of review. *State v. Martinez*, No. 13-14-00117-CR, 2015 Tex. App. LEXIS 4380, *12–13 (Tex. App.—Corpus Christi 2015, no pet.) *citing State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013). The appellate court gives almost total deference to the trial judge's determination of historical facts and of mixed questions of law and fact that rely on credibility determinations if they are supported by the record. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *Martinez*, 2015 Tex. App. LEXIS 4380, *12–13. The appellate court affords the prevailing party the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *Wade v. State*, 422 S.W.3d 661, 666–67 (Tex. Crim. App. 2013); *Guzman*, 955 S.W.2d at 89. A reviewing court reviews *de novo* the trial court's application of law to a particular set of facts. *Wade*, 422 S.W.2d at 667. The appellate court will uphold the trial judge's ruling if it is correct on any theory of law reasonably supported by the record. *Id*. Because the trial court is the exclusive fact-finder, the appellate court reviews evidence adduced at the suppression hearing in the light most favorable to the trial court's ruling. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). The defendant bears the initial

burden of producing evidence to rebut the presumption of proper police conduct. *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). The defendant satisfies this burden by showing that the search or seizure occurred without a warrant, shifting the burden to the State to show either the existence of a warrant or that the search and seizure was reasonable. *Id*. Absent a showing of an abuse of discretion, the trial court's fact findings should not be disturbed. *Maddox v. State*, 682 S.W.2d 563, 564 (Tex. Crim. App. 1985).

ISSUE 1: The Appellant has forfeited or waived her arguments.

For the first time on this Court's review, the Appellant raises the argument under *Rawlings v. Kentucky*, 448 U.S. 98 (1980) that probable cause is determined by an objective standard and the arrest need not precede the search incident to arrest as long as the probable cause had been established prior to the search. The Appellant also now raises for the first time in this direct appeal that under *Davenpeck v. Alford*, 543 U.S. 146 (2004) the police did not need to inform Mr. Sanchez of the reason for his arrest, and therefore, it was incorrect, under the totality of the circumstances standard, for the Court of Appeals to consider that he was arrested only for traffic warrants. Mr. Sanchez posits that Appellant forfeited or waived her arguments under *Rawlings* and *Davenpeck* because the same were not preserved by presentation to the District Court and the Court of Appeals. See TRAP 33.1(a).

The Court of Appeals recognized additional waiver when it properly held:

> Furthermore, we may not rely on the automobile exception to validate the search because the State did not raise the exception in its brief to this Court. See State v. Woodard, 341 S.W.3d 404, 412 (Tex. Crim. App. 2011) (holding that it is the State's burden to demonstrate that a warrantless search fits into an exception to the warrant requirement). We overrule the State's first issue.

Sanchez, 501 S.W.3d at 171. In footnote 3, the Court of Appeals further properly held:

> We note that even though the State explicitly challenged conclusion of law number six, it did not address conclusion number three, which reads: "[t]he officer did not have probable cause to believe that the vehicle contained evidence of a crime before the search of the Defendant's vehicle."

Sanchez, 501 S.W.3d at 171.

The Appellant has forfeited or waived review at this Court of each of the Appellant's arguments by failing to specifically raise below those issues of which the State now complains. The Court of Appeals correctly determined that the Appellant fatally waived all of her arguments by not challenging on appeal the District Court's conclusion of law three even though the State presented argument on appeal as to conclusion of law number six. TRAP 38.1(f) and (i). The Appellant ignores application of this forfeiture or waiver doctrine under TRAP and now attempts to raise these new arguments for the first time before this Court. The failure to brief, or adequately brief, an issue by an appellant effects a waiver of that issue on appeal. *See Swearingen v. State*, 101 S.W.3d 89, 100 (Tex. Crim. App.

2003). This Court does not have a different set of forfeiture or waiver rules, which are applicable only when the State is the appellant.

Lastly, the District Court's findings and conclusions were based on and addressed arguments made by the Appellant at the District Court. The Appellant insisted throughout the hearing on Mr. Sanchez's motion to suppress that the automobile exception to the warrant requirement under *Gant* was related only to the wingspan and reach of the car's occupants. 2R38, 57–59, 71–77. Mr. Sanchez's brief to the Court of Appeals was written based upon Appellant's arguments in the District Court that Mr. Sanchez's wingspan or reach was relevant to the inquiry of whether a warrantless search of the vehicle was permissible. Appellant has since backed off of that former position, and has now presented this Court with new arguments under the automobile exception for a warrantless search without regard to wingspan and reach. Said Appellant's arguments are forfeited or waived in that they were not properly raised in the District Court and in the Court of Appeals.

ISSUE 2: Alternatively, and without waiving the foregoing argument, the Thirteenth Court of Appeals properly interpreted *Arizona v. Gant* by applying the totality of the circumstances when determining the validity of the search incident to arrest.

ISSUE 3: The Thirteenth Court of Appeals' decision and judgment are correct.

A reviewing court's analysis of the reasonableness of a warrantless search begins with the basic rule that "searches conducted outside the judicial process,

without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) *citing Katz v. United States*, 389 U.S. 347, 357 (1967). Among the exceptions to the warrant requirement is a search incident to a lawful arrest. *See Weeks v. United States*, 232 U.S. 383, 392 (1914). The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. *See United States v. Robinson*, 414 U.S. 218, 230-234 (1973); *Chimel v. California*, 395 U.S. 752, 763 (1960).

In *Gant*, the defendant was arrested for driving with a suspended driver's license. He was handcuffed and locked in the back of a patrol car. The Court determined that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement did not justify the search because (1) police could not reasonably have believed that respondent could have accessed his car at the time of the search since the five officers outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched respondent's car, and (2) police could not reasonably have believed that evidence of the offense for which respondent was arrested might have been found in the car since he was arrested for driving with a suspended license, an offense for which

police could not expect to find evidence in the passenger compartment of his car. *Arizona v. Gant*, 556 U.S. 332 (U.S. 2009).

The Appellant focuses on the second *Gant* prong to justify a warrantless search of Mr. Sanchez's vehicle and cites to distinguishable precedence in support of its proposition.

The Appellant relies on *Daves v. State*, 327 S.W.3d 289 (Tex. App.—Eastland 2010, no pet). In *Daves*, the driver's arrest was for possession of narcotic paraphernalia gave the officers reason to believe that the vehicle would contain evidence related to that offense. Various sundry drugs were found in the vehicle, in the vicinity of the appellant, who was not the driver.

The Appellant also cites to two Kentucky cases to support its proposition that when a search incident to arrest of the suspect's person leads to the discovery of narcotic paraphernalia the search of the vehicle is authorized under Gant. *See Owens v. Commonwealth*, 291 S.W.3d 704, 707-708 (Ky. 2009); *see also Robbins v. Commonwealth*, 336 S.W.3d 60, 63 (Ky. 2011) (upholding search of the vehicle based on officer's testimony that the defendant threw a bindle to the ground, had a significant amount of cash on his person, the defendant was a known convicted drug trafficker, and that in his experience, drug traffickers typically keep controlled substances in multiple locations).

The Appellant also noted that *Gant* itself approved of the circumstances surrounding the searches in *New York v. Belton*, 453 U.S. 454 (1981) and *Thorton v. United States*, 541 U.S. 615 (2004) as being within the second justification. *See Gant*, 556 U.S. at 343-44. In *Thorton*, the officer arrested the suspect after discovering two baggies, one of marijuana and the other of cocaine, on the suspect's person. *Thorton*, 541 U.S. at 618. In *Belton*, the officer smelled burned marijuana and observed an envelope marked "Supergold", which the officer associated with marijuana; the suspects were asked to exit the vehicle and were placed under arrest for possession of marijuana. *See Belton*, 453 U.S. at 455-456." *See* page 4, fn 2 of Appellant's brief.

Citing *Hill v. State*, 303 S.W.3d 863, 876 (Tex. App.—Fort Worth 2009, pet. ref'd) and *State v. Ogeda*, 315 S.W.3d 664, 667 (Tex. App.—Dallas 2010, pet. ref'd), the Appellant argues that based on the totality of the circumstances it is reasonable for the arresting officer to conclude that having discovered drugs or drug paraphernalia on the suspect's person additional evidence of the possession would be found in the car. *See* Appellant's Brief, pg. 5.

There is no clear precedence that clarifies the meaning of "reason to believe." In Robert L. Farb's *The United States Supreme Court's Ruling in Arizona v. Gant*, April 26, 2009[1], it clarified the following:

> As discussed above, under Gant an officer is authorized, as a search incident to arrest, to search a vehicle if it is "reasonable to believe" that evidence relevant to the crime of arrest might be found in the vehicle. Does that require "probable cause," "reasonable suspicion," or some lesser standard of reasonableness under the Fourth Amendment? The Court did not offer an explanation. The term appears in Justice Scalia's concurring opinion in Thornton v. United States ("I would therefore limit Belton searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle"). 541 U.S. 615, 632 (2004). Neither his concurring opinion nor his cited cases provide a definitive answer. The Court used a similar term, "reason to believe," in Payton v. New York ("for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within") without defining it. 445 U.S. 573, 603 (1980). Justice Stevens authored the Court's opinions in both Payton and Gant. Federal appellate courts have split on its meaning, but a large majority have interpreted the term to mean less evidence than is required to establish probable cause. (Citation omitted). The Court also used "reason to believe" in Terry v. Ohio, 392 U.S. 1, 27 (1968), the source of the stop and frisk justification, which in the course of the Court's later cases has come to mean "reasonable suspicion." The Court in Gant could have employed "reasonable suspicion" but it did not. The definitive answer awaits a future United States Supreme Court ruling or, before then, lower federal court or state appellate court rulings.

[1] Found at http://www.ncids.org/Defender%20Training/2010%20Spring%20Conference/ArizonaV.Gant.pdf (last checked 4-21-17).

The Appellant fails to consider some of the presented testimony the District Court considered incredible. Specifically, the District Court took note that Mr. Sanchez was arrested only for traffic warrants (2R55) based on testimony during the hearing. 2R20, 21, 28, 34.

Further, the District Court found some of Officer Martinez's testimony to be incredible:

> Q. Isn't it a fact that when officers stop somebody, 99.9 percent of the time, they're nervous?
>
> A. I don't know the statistics, sir, but...
>
> Q. Most of them are?
>
> A. Almost always.
>
> Q. Most of them are?
>
> A. Yes, sir.
>
> Q. So it's nothing unusual for somebody to be nervous?
>
> A. No.
>
> Q. Nothing unusual for somebody to have a fixed stare when an officer is searching?
>
> A. Right.

2R33–34

> Q. And how could you tell that there was probably something? Did you see a little trail of cocaine from the car to the defendant?
>
> A. No, I did not.

….

Q. So you had arrested him first, and then you did the search?

A. Right.

Q. And when you did the search, you found this cigarette that he had in his pocket?

A. Yes.

Q. Did you have reason to believe that a weapon might be inside the cigarette pack?

A. Could have been, yes.

Q. A pistol maybe?

A. A pistol, a knife.

Q. Inside the cigarette pack?

A. A knife.

Q. Inside the cigarette pack?

A. Yes.

Q. Okay. And that's why you searched the cigarette pack. That's what–

A. Yes.

2R37.

The Court then had a colloquy with the Assistant District Attorney:

THE COURT: Okay. So you're saying that any time someone who is stopped -- well, there was no traffic to stop. He was already stopped --

> and they find, I'm assuming, a small useable amount of cocaine, there's not been any testimony or evidence of the amount, but I'm assuming, based on the cigarette box, although she said there could have been a weapon in the cigarette box, but it's -- you believe that that justified the search of the vehicle at that point in time?

The Assistant District Attorney responded:

> MR. KAPUR: If the officer does have reason to believe, on a reasonable suspicion standard, that further evidence of the crime that she had just seized could be found within the vehicle itself, yes. And that coincides with the reasoning in Gant. Because Gant reiterates Chimel and specifically states that if the defendant is still under custodial arrest, if evidence has been seized from the defendant on his person and that officer has reason to believe that there's further evidence of the crime in the vehicle --

2R58–59.

The Appellant wants to do away with the standard of review that requires almost total deference to the District Court as to factual and credibility findings. The Appellant forgets that the District Court's decision must be given almost total deference on its determination of historical facts and of mixed questions of law and fact that rely on credibility determinations if they are supported by the record. *Martinez*, 2015 Tex. App. LEXIS 4380 at *12–13. Like the Court of Appeals, this court must afford Mr. Sanchez the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *Wade*, 422 S.W.3d at 666–67; *Guzman*, 955 S.W.2d at 89; *Carmouche*, 10 S.W.3d at 327. This Court must uphold the trial judge's ruling if it is correct on any theory of law reasonably

supported by the record. *Id*. Absent a showing of an abuse of discretion, the trial court's finding should not be disturbed. *Maddox*, 682 S.W.2d at 564.

The District Court implicitly found lack of credibility in Officer Martinez's pertinent testimony. Just because the search of Mr. Sanchez's person was found to be valid (a decision which is subject to appellate review upon the completion of that case), that does not mean that all of Officer Martinez's testimony was credible. Officer Martinez's testimony that Mr. Sanchez had a fixed stare, while she was searching the vehicle, did not serve as a justifiable basis for the reason to believe or probable cause standard to justify a warrantless search of the vehicle, given the totality of this case's circumstances.

Here, this Court must consider that what is on appeal in this case is the District Court's decision to grant Mr. Sanchez's motion to suppress as to the cocaine found in the vehicle, not the cocaine found on Mr. Sanchez's person. 1C18. The District Court's findings only related to the court's order granting the motion to suppress of the cocaine found in the vehicle. Mr. Sanchez is unable to appeal the District Court's ruling as to the cocaine found on his person, until after conviction thereof. Further, the Court of Appeal's statement that the District Court impliedly concluded that the pat-down search which disclosed the cocaine in the package of cigarettes was legal, is mere dicta, and does not serve as a legal rule of

law in that Court's decision, due to Mr. Sanchez's current inability to challenge the District Court's order at the Court of Appeals. *See Sanchez*, 501 S.W.3d at 170.

Reason to detain, investigate, and pat down require the officer to articulate reasonable circumstances to so act or the officer's conduct is barred by the Fourth Amendment to the U.S. Constitution. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968). An officer's evidentiary search fails to comply with the Fourth Amendment unless he can state "probable cause" to believe the search will probably produce evidence of criminal conduct and the facts fall within an exception to the warrant requirement announced in the Fourth Amendment. *Terry v. Ohio*, 392 U.S. at 15–15. Probable cause is not demonstrated by facts amounting merely to "reason to believe." Robert L. Farb, *The United States Supreme Court's Ruling in Arizona v. Gant*, April 26, 2009. The State's evidence amounted to no more than that.

The District Court's unchallenged conclusion three reads:

> The Officer did not have probable cause to believe that the vehicle contained evidence of a crime before the search of the Defendant's vehicle.

2C5.

Obviously, the District either disregarded Officer Martinez's relevant testimony as incredible or as insufficient to constitute the "probable cause" required to comply with the Fourth Amendment's warrant clause.

Further, bare conclusory allegations to the effect that the investigating officer has reason to believe that the defendant committed the offense are insufficient even to show probable cause, much less to convince a jury of the defendant's guilty beyond a reasonable doubt. *See Earhart v. State*, 823 S.W.2d 607, 631 (Tex. Crim. App. 1991); *Miller v. State*, 736 S.W.2d 643, 647 (Tex. Crim. App. 1987) (holding that the officer's statement that "I have good reason to believe and do believe and charge" that suspect committed offense is insufficient); *Green v. State*, 615 S.W.2d 700, 705 (Tex. Crim. App. 1981) (holding that the officer's statement that he "has good reason to believe and does believe and charge" that suspect committed the offense is insufficient.

Something more than a fixed stare or a questionable search into a cigarette box found on Mr. Sanchez's pocket for a knife or pistol was needed to justify the warrantless vehicle search under the Fourth Amendment. In the District Court's exercise of discretion and in deciding the credibility of the witnesses, the finding of cocaine on Mr. Sanchez's person was also not sufficient to justify a warrantless search of the vehicle.

CONCLUSION AND PRAYER

As a result of the foregoing, the opinion and judgment of the Court of Appeals must be upheld.

Mr. Sanchez prays that this Court withdraw its grants of Appellant's Petition for Discretionary Review and affirm the decision of the Court of Appeals.

Respectfully submitted,

Law Office of Victoria Guerra
3219 N. McColl Rd.
McAllen, Texas 78501
(956) 618-2609
(956) 618-2553 (fax)

By: */s/ Victoria Guerra*
Victoria Guerra
Appellate Attorney for Appellee
State Bar No.: 08578900

CERTIFICATE OF SERVICE

On this day, the foregoing document was delivered to Appellant's counsel Michael Morris via email: Michael.Morris@da.co.hidalgo.tx.us the State Prosecuting Attorney, Lisa McMinn via email: Lisa.McMinn@SPA.texas.gov

SIGNED this 26th day of April, 2017.

/s/ Victoria Guerra
Victoria Guerra

CERTIFICATE OF COMPLIANCE

In compliance with TRAP 9.4(i)(3), the undersigned certifies that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(l), is 4,269.

SIGNED this 26th day of April, 2017.

/s/ Victoria Guerra
Victoria Guerra