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No. 17-0588

In the Texas Court of Criminal Appeals

HAROLD WAYNE HOLOMAN,
APPELLANT,

v.

THE STATE OF TEXAS,
APPELLEE.

Amici Curiae Brief of the Texas Criminal Defense Lawyers Association & Denton County Criminal Defense Lawyers Association in Support of Petitioner

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INTEREST OF AMICUS CURIAE

The Texas Criminal Defense Lawyers Association (TCDLA) is a non-profit, voluntary, membership organization. It is dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and the constant improvement of the administration of criminal justice in the State of Texas.

Founded in 1971, TCDLA currently has a membership of over 3,000 and offers a statewide forum for criminal defense lawyers. It provides a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases. TCDLA also assists the courts by acting as *amicus curiae* in appropriate cases.

The Denton County Criminal Defense Lawyers Association (DCCDLA) is a nonprofit professional organization of lawyers with approximately 200 members in the State of Texas. All members of DCCDLA are practicing criminal defense attorneys. The purpose and mission of the DCCDLA is educate the members by providing Continuing Legal Education on a variety of subjects related to criminal law and to vindicate the promise of the United States Constitution that an accused citizen has the right to the effective assistance of his or her counsel and to fundamental fairness.

Neither TCDLA, DCCDLA, nor any attorney representing TCDLA or DCCDLA have received any fee or other compensation for preparing this brief.

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the Texas Criminal Defense Lawyers Association and the Denton County Criminal Defense Lawyers Association, *Amici Curiae*, and respectfully submits this Amici Curiae Brief in Support of Appellant.

INTRODUCTION

The Penal Code details the methodology for how and when a court is to enhance punishment for a misdemeanor conviction. Under Penal Code Section 12.43, minimum sentences for misdemeanor convictions will be enhanced if a defendant has prior felony criminal history. That provision does not allow for punishing a misdemeanor conviction with a felony sentence. TEX. PEN. CODE § 12.43.

The State asks:

> Is a prior conviction for family violence under TEX. PENAL CODE § 22.01(b)(2)(A) always a guilt issue simply because it can be, and often is, used as a jurisdictional element?

The correct answer to this question is "yes." Because a prior conviction[1] for family violence both (1) enhances punishment and (2) effects the jurisdiction of the court hearing the case, the prior is an element of the offense, not a punishment enhancement.

[1] "Conviction" for purposes of a family violence finding includes successfully complete and unadjudicated deferred probations. Tex. Penal Code 22.01(f).

This question raises, again, the interpretation of the phrase "on the trial of the offense" and is the converse of issue that was raised in *Oliva v. State*, 548 S.W.3d 518 (Tex. Crim. App. 2018). Amici offer this brief because the State's position is inconsistent with the law defining what constitutes an "element" of an offense as opposed to an "enhancement." Amici oppose the new sentencing schema advanced by the State.

STATEMENT OF THE CASE, FACTS, AND UNDERLYING LAW

There are eight separate ways to commit third-degree felony assault. *See* TEX. PEN. CODE § 22.01(b). The State indicted Holoman under one of those provisions—assault/impeding breath. Importantly, the State did not indict Holoman for assault family violence with prior conviction, as allowed by Texas Penal Code § 22.01(b)(2)(A). This is a distinct offense from assault/impeding breath as defined by Texas Penal Code § 22.01(b)(2)(B).

Respondent was convicted of misdemeanor assault. *See* TEX. PEN. CODE § 22.01(a)(1). This was a lesser included offense of assault/impeding breath. *See id.* § 22.01(b)(2)(B) (defining assault/impeding breath as intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth).

Pursuant to its notice of intent to enhance punishment, during punishment on the Class A misdemeanor conviction, the State offered evidence of prior felony convictions and a prior conviction for assault family violence. At the conclusion of the evidence, the Court found the enhancements true and assessed punishment of twenty-five years' confinement.

The Court of Appeals correctly determined the twenty-five-year sentence for a misdemeanor conviction was an illegal sentence. It reversed the conviction and remanded the case to the trial court. *Holoman v. State*, No. 12-17-00364-CR, 2018 Tex. App. LEXIS 6203, at *8 (Tex. App.—Tyler Aug. 8, 2018). The State filed for rehearing, which was granted. The court withdrew the August 8, 2018 opinion and substituted it with a new opinion on November 5, 2018. *See Holoman v. State*, No. 12-17-00364-CR, 2018 Tex. App. LEXIS 9057, at *8 (Tex. App.—Tyler Nov. 5, 2018)(op. on reh'g). The opinion on motion for rehearing is the judgment of the court of appeals pending before this Court.

On direct appeal, the State averred *Oliva v. State*, 548 S.W.3d 518 (Tex. Crim. App. 2018) allows for the prior family violence finding as a punishment issue instead of an element of the offense. The Court of Appeals "reject[ed] this argument. It is axiomatic that the prior conviction provision in Section 22.01(b)(2)(A) is either an element of the offense of felony assault family violence with a previous conviction,

or serves to enhance the punishment of a misdemeanor assault family violence, not both." *Id.* The Court of Appeals correctly held, "the prior conviction requirement for assault family violence is an element of felony assault family violence under Section 22.01(b)(2)(A) and is required to be proven at the guilt phase of trial." *Id . (*citing *Oliva*, 548 S.W.3d at 533). The Court of Appeals concluded Holoman's twenty-five-year sentence for misdemeanor assault was illegal and modified the judgment, remanding the case to the trial court for re-sentencing. *Id.*

The State petitioned for review, which was granted (the instant case). *In re Holoman*, No. PD-1339-18, 2019 Tex. Crim. App. LEXIS 273, at *1 (Tex. Crim. App. Mar. 20, 2019). Briefing was ordered without oral argument. *Id.* Both the State and Respondent's briefs have been filed.

SUMMARY OF THE ARGUMENT

The position advanced by the State would judicially create a new sentencing schema by which a misdemeanor conviction may be punished as a felony. There is no provision in law that allows for a jury verdict adjudging guilt for a misdemeanor-level offense to receive felony-level punishment. Should such a schema be developed, it is the province of the Texas Legislature, not the courts, to create it.

This case presents the converse question that the Court addressed in *Oliva* in 2018 regarding DWI punishment. *Oliva v. State*, 548 S.W.3d 518 (Tex. Crim. App.

2018). There, the Court correctly determined that a DWI first was not an element of the offense of DWI second. Here, the Court is asked whether a prior family violence conviction may be treated solely as a punishment enhancement instead of as an element of the offense. The *Oliva* analysis applies equally well when considering whether a prior family violence conviction is an element (it is) or a punishment enhancement (it is not).

The existence of a prior family violence conviction affects both punishment and the jurisdiction of the court. The *Oliva* framework instructs that the prior conviction is an element of the offense. Because the prior family violence conviction affects both the punishment of the offense and the jurisdiction of the trial court, it is not merely a punishment enhancement, it is an element of the offense the State must indict and prove beyond a reasonable doubt.

The Court of Appeals was correct to reject the State's argument that a misdemeanor conviction may be sentenced as a felony. That judgment should be affirmed.

ARGUMENT

THE COURT OF APPEALS CORRECTLY REJECTED THE STATE'S ARGUMENT THAT A PRIOR FINDING OF FAMILY VIOLENCE MAY BE TREATED SOLELY AS A NON-JURISDICTIONAL PUNISHMENT ENHANCEMENT

I. THE LEGISLATIVE DEFINITION OF PUNISHMENT RANGES PROHIBITS ADOPTING THE STATE'S POSITION, WHICH WOULD EFFECTIVELY CREATE A NEW PUNISHMENT RANGE (AUTHORIZING FELONY PUNISHMENT FOR MISDEMEANOR CONVICTION) NOT AUTHORIZED BY THE LEGISLATURE

The Legislature has defined punishment ranges for offenses in Texas. *See* TEX. PEN. CODE § 12.01. Offenses are classified as either felonies or misdemeanors. *Id.* §12.02. Each classification has its own subset of punishment ranges.

A. Legislative definition of misdemeanor offenses and punishments

There are three classifications for misdemeanor offenses: class A, class B, and class C. *Id.* § 12.03(a). Class A misdemeanors are punishable by "(1) a fine not to exceed $4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement." *Id.* § 12.21. Class B misdemeanors are punishable by "(1) a fine not to exceed $2,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement." *Id.* § 12.22. Finally, "[a]n individual adjudged guilty of a Class C misdemeanor shall be punished by a fine not to exceed $500." *Id.* § 12.23.

B. Legislative definition of enhanced misdemeanor punishments

Holoman was convicted of a misdemeanor subject to enhancement. Penalties for repeat or habitual offenders set out in Penal Code § 12.43. That section allows a court to increase a Class A sentence up to a ninety-day minimum, but the maximum remains one-year. *Id.* § 12.43(a)(2). Class B sentences are increased to a thirty-day minimum sentence, but the maximum remains 180 days. *Id.* § 12.43(b)(2).

Under no circumstance is felony-level punishment authorized for a misdemeanor conviction. That is, however, precisely what the State seeks to accomplish by proving a prior family violence finding during punishment instead of during the guilt-phase of trial. That type of punishment neither envisioned nor permitted anywhere in the Penal Code.

C. Legislative definition of felony offenses and punishments

In contrast to misdemeanors, felony offenses are split into five categories: "(1) capital felonies; (2) felonies of the first degree; (3) felonies of the second degree; (4) felonies of the third degree; and (5) state jail felonies." *Id.* § 12.04. Capital felony punishment is covered by Penal Code § 12.31. First-degree felonies are "punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years" and an option fine not to exceed $10,000. *Id.* § 12.32. Second-degree felonies are "punished by imprisonment in the

Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years" and an option fine not to exceed $10,000. *Id.* § 12.33. Third-degree felonies are "punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years" and an option fine not to exceed $10,000. *Id.* § 12.34. State-jail punishment is governed by Texas Penal Code Sections 12.35 (standard range), 12.425 (habitual), and 12.44 (reduction).

D. Legislative definition of enhanced felony offenses and punishments

Repeat felony-offenders are punished under Texas Penal Code § 12.42. That provision, however, only applies after a felony conviction. *Id.* § 12.42. It does not apply to a misdemeanor conviction. *See id.* "[P]unishment for a class A misdemeanor cannot be enhanced by section 12.42(d) of the Penal Code, which is applicable only to felonies by its express terms." *Watson v. State*, 923 S.W.2d 829, 833 (Tex. App.—Austin 1996) *cf. Clifton v. State*, 156 Tex. Crim. 655, 246 S.W.2d 201, 203 (Tex. Crim. App. 1952) (op. on reh'g).

Here, the Court of Appeals correctly concluded that enhancing a misdemeanor conviction using Penal Code § 12.42(d) resulted in an illegal sentence. Assessing a twenty-five-year sentence for a Class A misdemeanor conviction is impermissible.

II. A PRIOR FAMILY VIOLENCE FINDING IS AN ELEMENT OF THE OFFENSE IN PENAL CODE 22.01(B)(2)(A), NOT A SEPARATELY PROVABLE PUNISHMENT ENHANCEMENT

A. Jurisdictional elements are always jurisdictional, never solely for purposes of punishment

Because the prior family violence conviction goes to both jurisdiction and punishment, the prior is an element of the offense. *See Oliva*, 548 S.W.3d at 518. Indeed, it is the prior family violence finding that elevates the misdemeanor offense described in Section 22.01(a)(1) to the felony offense defined in Section 22.01(b)(2)(A). But-for a prior family violence finding, an allegation under Penal Code § 22.01(b)(2)(A) is a Class A Misdemeanor. *Compare* TEX. PEN. CODE § 22.01(a)(1) *and* TEX. PEN. CODE § 22.01(b)(2)(A).

This Court has rejected the notion that there is a special category of "jurisdictional" elements that are not elements for all purposes. It has reaffirmed this position as recently as last year in the *Oliva* opinion:

> For the phrase 'are not jurisdictional' to have meaning, then, something that would otherwise be a punishment issue must become an element because it is jurisdictional. In fact, our prior-conviction jurisprudence in both DWI and theft cases has emphasized the jurisdictional nature of certain prior-conviction provisions in concluding that they prescribe elements.

Oliva, 548 S.W.3d at 533; *see Ex parte Benson*, 459 S.W.3d 67, 76-77 & n. 54 (Tex. Crim. App. 2015) ("Similarly, these practical consequences weigh against the dissent's suggestion that we treat 'jurisdictional' elements as being different from other elements for double-jeopardy purposes.").

B. Elements of assault as defined by Penal Code 22.01(b)

Within limits, the question of whether a fact is an element or sentencing factor is normally a matter for the legislature. *See Staples v. United States*, 511 U.S. 600, 604, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994) (definition of a criminal offense entrusted to the legislature, "'particularly in the case of federal crimes, which are solely creatures of statute'")(quoting *Liparota v. United States*, 471 U.S. 419, 424, 85 L. Ed. 2d 434, 105 S. Ct. 2084 (1985)); *McMillian v. Pennsylvania*, 477 U.S. 79, 84-91, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986).

The legislature writes the laws, and the courts interpret them. Indeed, the "Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled 'The Legislature of the State of Texas.'" TEX. CONST. art. III, § 1. In accordance with this power, the legislature has defined eight ways to commit third-degree assault.

Only one of these provisions references a prior finding—when a a violation of Texas Penal Code § 22.01(b)(2)(A) is alleged. That inclusion is consistent with the

requirement that the indictment or information set out all elements of the offense because an indictment or information must set forth each element of the crime that it changes. *Almendarez-Torres v. United States*, 523 U.S. 224, 228-29, 118 S. Ct. 1219, 1223, 140 L.Ed.2d 350 (1998). An "element of the offense means: the forbidden conduct, the required culpability, any required resulted, and the negation of any exception to the offense." TEX. PEN. CODE § 1.07(a)(22).

If the prior conviction was not an element, it would not be set forth. It would only be relevant to sentencing, and factors relevant only to the sentencing of an offender found guilty of the charged crime are not included in the indictment. This is precisely the reason a prior DWI conviction (Class-B or -A) is listed in the misdemeanor information as an enhancement paragraph and not as an element of the offense, while a prior family violence finding is listed in the body of a charging instrument. *See generally Oliva*, 548 S.W.3d at 518.

Article 36.01 provides some guidance, indicating: "When prior convictions are alleged for purposes of enhancement only *and* are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07." TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(1) (emphasis added).

The correct interpretation of "purposes of enhancement only *and* are not

jurisdictional" requires both enhancement of punishment and effect on jurisdiction in order to be an element of the offense. Indeed, "to avoid rendering part of Article 36.01 meaningless[. The Court] must also give meaning to the phrase 'are not jurisdictional.'" *Oliva*, 548 S.W.3d at 533.

The first step to confirming this is the correct interpretation is to determine what the Legislature intended. *See Almendarez-Torres*, 523 U.S. at 228-29, 118 S. Ct. at 1223.

> Did it intend the factor that the statute mentions, the prior aggravated felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment? In answering this question, we look to the statute's language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text.

Id.; *see*, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); *Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985).

Here, the Legislature has spoken regarding whether the prior is an element of the offense. Penal Code § 22.01(a) defines misdemeanor assault: "A person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse . . ." TEX. PEN. CODE § 22.01(a)

Penal Code § 22.01(b) lays out eight different methods by which a third-degree assault is committed. Those are:

1) 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;

2) 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: (2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if: (A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or

3) 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: (2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if: (B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth;

4) 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: (3) a person who contracts with government to perform a service in a facility as defined by Section 1.07(a)(14), Penal Code, or Section 51.02(13) or (14), Family Code, or an employee of that person: (A) while the person or employee is engaged in performing a service within the scope of the contract, if the actor

knows the person or employee is authorized by government to provide the service; or

5) 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: (3) a person who contracts with government to perform a service in a facility as defined by Section 1.07(a)(14), Penal Code, or Section 51.02(13) or (14), Family Code, or an employee of that person: (B) in retaliation for or on account of the person's or employee's performance of a service within the scope of the contract;

6) 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: (4) a person the actor knows is a security officer while the officer is performing a duty as a security officer;

7) 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: (5) a person the actor knows is emergency services personnel while the person is providing emergency services; or

8) 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: (6) a pregnant individual to force the individual to have an abortion.

TEX. PEN. CODE § 22.01(b).

For purposes of dispensing with the State's position that the prior family violence act may be a punishment enhancement, and not an element of the offense, one need only consider methods number two and three:

2) 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: (2) a person whose relationship to or association with the

> defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if: (A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or

Id. § 22.01(b)(2)(A).

> 3) 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: (2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if: (B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth;

Id. §22.01(b)(2)(B).

If the legislature had intended an element of Section 22.01(b)(2)(A) to be used as an enhancement provision for a trial alleging violation of Section 22.01(b)(2)(B), the legislature would have provided for that use. The legislature has not provided that use.

C. Analysis of the contents of the hypothetically correct jury charge further support the conclusion that the prior family violence finding is an element

Under a hypothetically correct jury charge, the State was required to prove that:

> (1) [Holoman],
> (2) intentionally, knowingly, or recklessly,

(3) caused bodily injury to [complainant],
(4) who is a person described by Section 71.0021(b), 71.003, or 71.005, Family Code, and
(5) [Holoman] had previously been convicted of an assault involving family violence.

See TEX. PEN. CODE § 22.01(b)(2)(A); *Davis v. State*, 533 S.W.3d 498, 505-06 (Tex. App.—Corpus Christi 2017) *cf. State v. Cagle*, 77 S.W.3d 344, 346 n. 2 (Tex. App.—Houston [14th Dist.] 2002).[2]

The Court of Appeals correctly determined that the prior family violence finding cannot elevate a misdemeanor conviction to felony punishment. *Holoman v. State*, No. 12-17-00364-CR, 2018 Tex. App. LEXIS 9057, at *8 (Tex. App.—Tyler Nov. 5, 2018)(op. on reh'g). Misdemeanors cannot be punished as felonies. Because the prior family violence finding affects both the jurisdiction of the court and the punishment to be assessed upon conviction and is therefore an element of the offense as contemplated by Article 36.01(a)(1).

[2] *Cagel* relies upon *Wilson v. State*, 772 S.W.2d 118, 121-22 (Tex. Crim. App. 1989), the continued validity of which was rejected in *Ex parte Benson*, 459 S.W.3d 67, 89 (Tex. Crim. App. 2015).

III. CORRECTLY INTERPRETING STATUTORY LANGUAGE THAT "IF IT IS SHOWN ON THE TRIAL OF THE OFFENSE" REQUIRES ANALYSIS OF THE SPECIFIC SECTION IN CONTEXT WITH THE ENTIRE STATUTE

A. Where the prior affects both jurisdiction and punishment, the proper time to prove the prior is during the guilt phase of trial

It is axiomatic that jurors may not consider punishment prior to guilt. For that reason, enhancement provisions are not presented during the guilt phase unless they are (a) jurisdictional, (b) elemental for the offense, or (c) both jurisdictional and elemental. In that circumstance, a limiting instruction on use of the prior is the proper, and sufficient, method for so restricting the evidence. *See* TEX. R. EVID. 105; TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(a).

The Legislature's inconsistent use of the phrase "if it is shown on the trial of the offense" is ambiguous. In some, but not all, circumstances, interpreting "if it is shown on the trial of the offense" to mean "if it is shown during guilt-innocence" is correct. It appears that the phrase "shown on the trial of an offense" when paired with language directed at offense-level classification has acquired a technical meaning apart from punishment enhancement.

Article 36.01 helps to define these circumstances. If the prior conviction goes to both jurisdiction *and* punishment range, then the proper interpretation of "if it is shown on the trial of the offense" requires proof during the guilt phase of the trial. In most places in the Penal Code where this phrase is paired with an offense-level

enhancement, the phrase notes an element of the State's case. That usage is not entirely consistent across the Penal Code,[3] but it is the correct interpretation for determining when to prove a prior family violence finding.

Unfortunately, the legislature has used the phrase "shown on the trial of the offense" to designate elements of a primary offense,[4] aggravating factors,[5] and punishment categories.[6] Interestingly, there appears to be a correlation between the placement of the punishment range and whether the use of the phrase "if it is shown on trial of the offense" states an element, an aggravating factor, or a punishment

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[3] This is a legislative problem, fit for resolution by the Legislature. Counsel's (admittedly irrelevant) opinion is that the phrase "if it is shown on the trial of the offense" should be struck by the Legislature in favor of specifically defining elements, aggravating factors, and punishment enhancements within each offense.

[4] *See* TEX. PEN. CODE § 22.01(b)(2)(A). *See illustratively* TEX. TRANSP. CODE § 521.457(f) (prior DWLI conviction invokes county court jurisdiction instead of municipal court jurisdiction); TEX. PEN. CODE § 49.09(b) (two prior DWI convictions vest District Court, instead of County Court, with jurisdiction); TEX. PEN. CODE § 31.03(e)(4) (two prior misdemeanor theft convictions vest District Court with jurisdiction over third or greater theft); TEX. PEN. CODE § 38.04 (prior evading enhances subsequent evading thereby depriving the county court of jurisdiction, vesting the district court with jurisdiction, and enhancing punishment).

[5] *See, e.g.* TEX. PEN. CODE § 15.031; TEX. PEN. CODE § 20.05; TEX. PEN. CODE § 2.31; TEX. PEN. CODE § 15.031; TEX. PEN. CODE § 35A.02 (each statute providing where an otherwise-non-criminal act is a fact of consequence providing for a higher degree of punishment.)

[6] *See* TEX. PEN. CODE § 31.03(e) (punishment levels for theft); TEX. PEN. CODE § 32.21(e-1) (punishment levels for obtaining property or services via fraud); TEX. PEN. CODE § 32.23(e) (punishment levels for trademark counterfeiting); TEX. PEN. CODE § 32.32(c) (punishment levels for false statements to obtain credit or property); TEX. PEN. CODE § 32.33(d) (punishment levels for hindering secured creditors);TEX. PEN. CODE § 32.34(f) (punishment levels for fraudulent transfer of motor vehicle); TEX. PEN. CODE § 32.35(e) (punishment levels for credit card transaction record laundering); TEX. PEN. CODE § 32.45(c) (punishment levels for misapplication of fiduciary property).

enhancement. Unfortunately, the pattern does not hold sufficiently strong to imply a specific legislative intent from that placement.

B. *Oliva* did not create a new category of quasi-jurisdictional elements

"[A] prior conviction must be proved at the guilt stage of trial if it is an element of the offense, whether or not it is jurisdictional." *Calton v. State*, 176 S.W.3d 231, 235 (Tex. Crim. App. 2005) (superseded by statute). This "jurisdictional" exception in Article 36.01 hearkens back to the language of *Broughton* and appears to be a legislative recognition that prior convictions that are needed to make an offense a felony (vesting jurisdiction in the district court) were not mere enhancements but were elements of the offense. *Ex parte Benson*, 459 S.W.3d 67, 83 (Tex. Crim. App. 2015). The prior family violence finding is needed to vest the court with jurisdiction when alleging a violation of Penal Code § 22.01(b)(2)(A). It is, therefore, an element of the offense that must be proven beyond a reasonable doubt during the guilt phase, not a mere enhancement.

Many places in the Penal Code use the phrase "if it is shown on the trial of the offense" to mean "if it is shown during guilt-innocence." That usage is not entirely consistent across the Penal Code, but it is the correct interpretation for determining when to prove a prior family violence finding. The timing of proof of an element is important because of the bifurcation of Texas criminal trials. Trials have

been bifurcated in Texas since the 1965 amendment to the Code of Criminal Procedure. *See* Code of Criminal Procedure Act, 59th Leg., R.S., ch. 722, § 1, art. 37.07, sec. 2, 1965 Tex. Gen. Laws, vol. 2, p. 317, 462.

Proceedings in a bifurcated trial require (1) if a fact goes to the guilt of the defendant for the offense charged, it is presented in the first phase of trial and (2) if the fact goes solely and specifically to punishment, it is presented during the second phase of trial. The bifurcation statute provides,

> In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, *which are tried before a jury on a plea of not guilty*, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

Barfield v. State, 63 S.W.3d 446, 449-50 (Tex. Crim. App. 2001) (quoting TEX. CODE CRIM. PROC. ANN. art. 37.07 § 2(a)) (emphasis *Barfield*); *see also* TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(1).

Because the prior family violence finding goes to both jurisdiction and punishment, it is properly an element of the offense. Again, a contrast between DWI third or more, where the priors are a jurisdictional element of the offense, to DWI-second (enhanced by prior conviction), where the prior is relevant exclusively to punishment, and not to jurisdiction, provides utility.

Element versus enhancement - DWI

For a DWI third or more, prior DWIs are read into the charging instrument because they both enhance punishment and provide for the Court's jurisdiction. For a DWI second, the prior DWI conviction enhances punishment but does not alter the Court's jurisdiction. Because, in the case of a DWI second, the prior DWI only enhances punishment and is not jurisdictional, that "portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07." TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(1); *Oliva*, 548 S.W.3d at 533.

Element versus enhancement – family violence finding

Similarly, with an allegation under Section 22.01(b)(2)(A), the prior finding of family violence is an element of the offense. It affects both jurisdiction (depriving county court of jurisdiction and vesting jurisdiction in the district court) *and* punishment (raising from Class A to third-degree felony). This is the only interpretation that gives full effect to Article 36.01. As this Court recognized in *Oliva*: "our caselaw has explicitly recognized that 'jurisdictional' allegations are those that raise the level of the offense from a misdemeanor to a felony, which in turn results in vesting jurisdiction of the offense in district court—a court that generally lacks jurisdiction over misdemeanors." *Oliva*, 548 S.W.3d at 533.

Interpreting the prior family violence finding in Section 22.01(b)(2)(A) as an element is consistent with many places in the Penal Code where that finding (or conviction) is essential to the jurisdiction of the Court. *See* TEX. PEN. CODE § §22.01(b)(2)(A) (see footnote 4, supra). Accordingly, the correct interpretation is that reached by the Court of Appeals—a prior family violence finding is a jurisdictional allegation for the offense of assault alleged under 22.01(b)(2)(A).

C. The State's interpretation of *Oliva's* effect on whether an element of an offense may be proven outside the guilt phase of trial creates a new punishment schema not authorized by the legislature

The State argues that a prior family violence finding may be proven either during the guilt phase or punishment phase to enhance a misdemeanor family violence offense to a felony. *See* Br. of St. Pros. Atty at 8–13. Accepting that argument would create a new schema of punishment for enhancing misdemeanor convictions to felony punishment.

Misdemeanors are punished as misdemeanors. *See* TEX. PEN. CODE §§ 12.21, 12.22, 12.23, 12.43. Felony convictions, unless punished using Section 12.44, are punished as felonies. Nothing in the existing Penal Code allows for felony-level punishment enhancement of a misdemeanor conviction. *See id.* §§ 12.42, 12.425, 12.43, 12.44. A defendant must be convicted of a felony to be punished for a felony.

Only the legislature has the authority to create a new sentencing schema. If the legislature deems it appropriate to punish recidivists convicted of a misdemeanor with felony-grade punishment, the legislature has the authority to amend Penal Code § 12.43 to provide for that type of punishment.

IV. ALLOWING AN ELEMENT OF ONE OFFENSE TO BE USED AS AN ENHANCEMENT PARAGRAPH FOR A SEPARATE OFFENSE RUNS AFOUL OF THE INDICTMENT CLAUSE

Holoman was charged with assault/impeding breath and has a prior family violence conviction. In that circumstance, the State has three options: (i) indict the assault/impeding breath using Penal Code § 22.01(b)(2)(B); (ii) indict the family violence/prior finding using Penal Code § 22.01(b)(2)(A); or (iii) indict both, as each requires an element the other does not and therefore indicting both would not run afoul of double jeopardy protections.

The State should have separately indicted (or included as a separate count in the primary indictment) the allegation of assault family violence with prior. The State's failure to indict that allegation, which is a separate criminal charge with separate elements from assault/impeding breath, prohibits the State from obtaining a conviction and sentence for that unique offense after Holoman was acquitted of the felony indictment presented to the Grand Jury.

A. Presentation of an indictment is necessary to invoke the jurisdiction of the district court

The presentment of an indictment vests a district court with jurisdiction. TEX. CONST. art. V, § 12(b). District courts and criminal district courts have original jurisdiction in criminal cases of all grades of felonies, of all misdemeanors involving official misconduct, and of misdemeanor cases transferred to the district court under Texas Code of Criminal Procedure Article 4.17.

An indictment or information must set forth each element of the crime that it changes. *Almendarez-Torres*, 523 U.S. at 228-29, 118 S.Ct. at 1223. The indictment or information need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime.

Here, the allegation of assault/impeding breath (Penal Code § 22.01(b)(2)(B)) is a separate and distinct offense from assault/prior family violence finding (Penal Code 22.01(b)(2)(A)). That is why the prior family violence finding is listed in the body of the indictment for an alleged violation of Penal Code 22.01(b)(2)(A).

When the face of the indictment charges a felony, the district court does not lose jurisdiction if the State is able to prove only a misdemeanor at trial. *See* TEX. CODE CRIM. PROC. ANN. art. 4.06; *Jones v. State*, 502 S.W.2d 771, 773-74 (Tex. Crim. App. 1973); *State v. Meadows*, 170 S.W.3d 617, 620 (Tex. App.—El Paso 2005, no pet.). Here, the State proved only a misdemeanor at trial, as Holoman was acquitted

of the felony offense for which he was indicted. Notably, if the State only proves a misdemeanor at trial, only misdemeanor punishment may be assessed. TEX. PEN. CODE § 12.43.

B. Criminal Defendants are constitutionally entitled to notice of the allegation against them

A criminal defendant has the constitutional right to notice of the exact criminal offense alleged against him. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; *State v. Barbernell*, 257 S.W.3d 248, 256 (Tex. Crim. App. 2008) (holding a sufficient charging instrument pleads the offense and provides adequate notice when it sets out the elements of the offense as detailed in the statute). Thus, the charging instrument must be specific enough to inform the accused of the nature of the accusation against him so that he may prepare a defense. *State v. Mays*, 967 S.W.2d 404, 406 (Tex. Crim. App. 1998); *Daniels v. State*, 754 S.W.2d 214, 217 (Tex. Crim. App. 1988); *Adams v. State*, 707 S.W.2d 900, 901 (Tex. Crim. App. 1986).

Here, Penal Code § 22.01(b)(2)(A) and § 22.01(b)(2)(B) charge separate offenses with distinct elements. Accordingly, the State cannot, after failing to prove the charge they indicted, pick an unindicted felony for which to assess felony punishment. *See Vick v. State*, 991 S.W.2d 830, 832-33 (Tex. Crim. App. 1999) (discussing use of a disjunctive in a conduct-oriented offense to delineate separate offenses). Holoman was not indicted for, and cannot be subject to punishment for, a

violation of Penal Code § 22.01(b)(2)(A) without violating the Indictment Clause where the specific offense in § 22.01(b)(2)(A) has never been indicted and was not proved to a jury.

V. THE COURT MAKING THE AGGRAVATING-FACTOR FINDING TO ENHANCE A MISDEMEANOR OFFENSE TO A FELONY LIKELY VIOLATES THE RIGHT TO TRIAL BY JURY

A. Defendant's right to trial by jury

The right to jury trial is protected by both the State and Federal constitutions. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI. Similarly, the Texas Constitution requires "[i]n all criminal prosecutions the accused shall have a speedy public trial by an impartial jury." TEX. CONST. art. I, §§ 10, 15 ("The right of trial by jury shall remain inviolate.").

These provisions are enforced against the State by diligent application of the Due Process Clauses in each constitution. *See* U.S. CONST. amend XIV; TEX. CONST. art. I, § 19 I. The subsequent family violence finding subjects defendants to a heightened punishment by increasing the statutory classification of the offense from a misdemeanor up to a felony. Accordingly, that finding should be made by the jury as a predicate to determining guilt. *See generally Apprendi v. New Jersey*, 530 U.S.

466, 490, 120 S. Ct. 2348, 2363, 147 L.Ed.2d 435 (2000) (holding the jury must find aggravating factors that increase penalty range).

B. *Apprendi* requires the jury find any aggravating factor that increases penalty range

"[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." *Butler v. State*, 189 S.W.3d 299, 302 (Tex. Crim. App. 2006) (quoting *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2363). The reason for this is simple: "[a] judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct." *United States v. Haymond*, 588 U.S. ___, 139 S.Ct. 2369 (2019) slip op. at *6– , Docket No. 17-1672 (June 26, 2019).

Indeed, during the early Republic, if an indictment or "accusation . . . lack[ed] any particular fact which the laws ma[d]e essential to the punishment," it was treated as "no accusation" at all. *Id. quoting* 1 Bishop § 87, at 55; *see also* 2 M. Hale, Pleas of the Crown *170 (1736). And the "truth of every accusation" that was brought against a person had to "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." *Haymond*, 588 U.S. at ___, slip op. at *6-7. (quoting 4 Blackstone 343).

Because the Constitution's guarantees cannot mean less today than they did the day they were adopted, it remains the case today that a jury must find beyond a reasonable doubt every fact " 'which the law makes essential to [a] punishment' " that

a judge might later seek to impose. *Blakely v. Washington* 542 U.S. 296, 304, 542 U.S. 296, 304, 159 L.Ed.2d 403 (2004)(quoting 1 Bishop § 87, at 55)." *Haymond*, 588 U.S. ___, slip op. at *6 – 7.

When the State alleges a prior family violence finding, that finding increases punishment to a felony. Therefore, the subsequent finding of family violence must be made by the jury, not the court. The requirement that the jury make the finding beyond a reasonable doubt is further support for the assertion that the prior family violence finding is an element of the offense, not a punishment enhancement.

Here, the fact necessary to increase the penalty is the finding of family violence. Because it is the second *finding* of family violence, and not the *conviction*, that enhances the punishment, the defendant is entitled to have the jury make the finding. *See Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2363. "[T]he relevant inquiry is one not of form, but of effect—does the required [judicial] finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Haymond*, 588 U.S. ___, slip op. at *8 (quoting *Apprendi*, 530 U.S. at 476-77, 120 S.Ct. at 2348). Accordingly, the court making this finding infringes upon the defendant's right to a jury determination of every fact necessary to determine his guilt.

Here, as in *Apprendi*, "at stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without due

process of law and the guarantee that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *Apprendi*, 530 U.S. at 476-77, 120 S.Ct. at 2348. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *see Sullivan v. Louisiana,* 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

To the extent that Article 42.013 allows for the court, and not the jury, to make the finding of family violence increasing defendant's punishment range from a misdemeanor to a felony, Article 42.013 violates the right to a jury trial contained in both the State and Federal Constitutions, and Defendant's entitlement to due process.

As the United States Supreme Court recognizes, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510, 115 S.Ct. at 2310. "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63.

In the case at bar, because the finding of family violence, in conjunction with the prior alleged family violence finding, is what elevates the punishment to a felony, the finding of family violence must be made by the jury. The jury did not make that finding. The court's assessment of felony punishment for a misdemeanor conviction is without support anywhere in the Code of Criminal Procedure or the Penal Code. Accordingly, the Court of Appeals was correct to determine the twenty-five-year sentence was illegal and was correct to remand for resentencing.

PRAYER

WHEREFORE, Amici pray the Court give due consideration to the arguments made and authorities cited prior to issuing an opinion in this matter, and that the Court AFFIRM the Court of Appeals, said panel having correctly rejected the State's arguments, correctly determined that the sentence was illegal, and correctly remanded to the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Petition was served on the following parties/entities on July 23, 2019 through electronic service each party has listed with the state e-filing service: Stacey Seoul, the State Prosecuting Attorney; W. Scott Nicholson and Wm. M. House, Jr., Counsel for Mr. Holoman; and Scott Holden of the Anderson County District Attorney's Office. Service on Appellant, Mr. Harold Wayne Holoman was effected via USPS mail to TDCJ #02167885, TDCJ-ID Gurney Unit, 1385 FM 3328, Palestine, Texas.

/s/Allison Clayton
Allison Clayton

CERTIFICATE OF COMPLIANCE

I certify the foregoing Brief on the Merits complies with Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure. The brief, excluding those portions detailed in Rule 9.4(i) of the Texas Rules of Appellate Procedure, is 7,035 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

/s/Allison Clayton
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