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

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS **APPELLANT**

V.

CRISPEN HANSON **APPELLEE**

THE STATE'S PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-15-00205-CR**

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TRIAL COURT: 243rd Judicial District Court of El Paso County, Texas, Honorable Judge Luis Aguilar, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Ann Crawford McClure, Justice Yvonne T. Rodriguez, and Justice Steven L. Hughes (Hughes, J., not participating)

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STATEMENT REGARDING ORAL ARGUMENT

The State does not believe that oral argument is necessary in this case, as the State's arguments are and will be set out fully in this petition and brief, should this Court grant review. However, should this Court determine that oral argument would be helpful in resolving the issues raised in this petition, the State would certainly welcome the opportunity to appear before the Court.

STATEMENT OF THE CASE

Crispen Hanson ("Hanson"), appellee, was indicted for capital murder (Count I), murder (Count II), and injury to a child (Counts III and IV). (CR:10-13).[1] In exchange for dismissal of Counts I (capital murder) and II (murder), Hanson pleaded guilty to Counts III and IV (injury to child) on January 16, 2015, and was sentenced, in open court, to eight years' confinement. (CR:204-08, 255); (RR2:5-8). On June 15, 2015, upon the trial court's *sua sponte* motion, the trial court suspended further imposition of Hanson's eight-year prison sentence and placed him on eight years' community supervision ("shock probation"). (CR:336-37, 340-42).[2] On June 25, 2015, the trial court entered an amended order (with

[1] Throughout this petition, references to the record will be made as follows: references to the clerk's record will be made as "CR" and page number, and references to the reporter's record will be made as "RR" and volume and page number.

[2] On April 14, 2015, after Hanson had begun serving his eight-year prison sentence and his felony conviction had become final, the trial court released Hanson from confinement "to the

additional fact findings) suspending further imposition of Hanson's prison sentence and placing him on community supervision. (CR:353-56). On July 13, 2015, the State filed notice of appeal of the trial court's amended order. (CR:360-63).

STATEMENT OF PROCEDURAL HISTORY

On July 26, 2017, in an unpublished opinion, the Eighth Court of Appeals held that the State's notice of appeal was untimely and thus dismissed this State's appeal for lack of jurisdiction. *See State v. Hanson*, No. 08-15-00205-CR, 2017 WL 3167484, at *3 (Tex.App.–El Paso, July 26, 2017, pet. filed)(not designated for publication). No motion for rehearing was filed by the State. The State now timely files this petition for discretionary review pursuant to rule 68.2(a) of the Rules of Appellate Procedure. *See* TEX. R. APP. P. 68.2(a).

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streets." (CR:309-10). The State filed a petition for writ of mandamus on May 13, 2015, which the Eighth Court ordered be considered a companion case to this State's appeal. *See* (Order dated July 16, 2015, in the Eighth Court's file on related original proceeding, 08-15-00161-CR, *available at* http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=39d85c79-e333-422f-81a8-82510446de7d&coa=coa08&DT=Other&MediaID=dc28820c-39da-4918-9b21-9ec584432af8). As a result of the trial court's order placing Hanson on shock probation, the Eighth Court dismissed the original proceeding as moot. *See In re State*, No. 08-15-00161-CR, 2017 WL 3167482, at *2 (Tex.App.–El Paso, July 26, 2017, orig. proceeding)(not designated for publication).

GROUNDS FOR REVIEW

GROUND FOR REVIEW ONE: Where, regardless of whether the shock-probation order was "original" or "amended," because it is a type of order identified as appealable under the plain language of article 44.01, and because the State's notice of appeal was filed within 20 days from the amended order's entry, the Eighth Court, in holding that the State's notice of appeal was untimely and dismissing the State's appeal for lack of jurisdiction, failed to give effect to the plain language of article 44.01 and thus erred.

GROUND FOR REVIEW TWO: Where, by entering an amended order, the trial court indicated its intent to supercede its original shock-probation order, and where the trial court's amended order contained additional fact findings that were a statutory prerequisite to the proper granting of shock probation, the Eighth Court erred in holding that it was the original (not the amended) order that constituted an "appealable" order. The State's notice of appeal from the amended order was therefore timely.

FACTUAL SUMMARY

On July 13, 2012, a four-count indictment was returned against Hanson for capital murder (Count I), murder (Count II), and injury to a child (Counts III and IV). (CR:10-13). On January 16, 2015, pursuant to a plea agreement, Hanson pleaded guilty to Counts III and IV (injury to child) in exchange for the State's dismissal of Counts I (capital murder) and II (murder). (CR:206-08, 255); (RR2:5-8). After accepting the parties' plea agreement, and pursuant thereto, the trial court sentenced Hanson to eight years' confinement and ordered him to surrender at a later date. (CR:8-9, 11).

After Hanson surrendered into custody on March 16, 2015, asserting that he "had been diagnosed with a rare and serious condition [that] require[d] immediate medical attention," Hanson filed a motion (and an amended motion) requesting that he simply be allowed to "resume" his bond before his (Hanson's) next medical appointment. (RR4:6); (CR:284, 303-07). Over the State's objection, the trial court released Hanson "to the streets" with no surrender date in place. (CR:309-10).

Because Hanson's felony conviction was final when the trial court released him to the streets, the State filed a petition for writ of mandamus on May 13, 2015, challenging the trial court's release order. *See Hanson*, 2017 WL 3167484 at *1 .

The next day, the trial court appointed defense counsel to respond to the State's petition for writ of mandamus, who advised the trial court that it was "within its right to suspend further implementation of [Hanson's] sentence" under article 42.12 §6 of the Texas Code of Criminal Procedure (i.e., the shock-probation statute),[3] as long as it held a hearing on the matter and entered its order before the statutory continuing-jurisdiction period expired on July 15, 2015. (CR:311-12, 326-29).[4] On June 11, 2015, the trial court filed a *sua sponte* motion to hold a hearing on whether to suspend further imposition of Hanson's prison sentence and place him on shock probation and set the hearing for June 15, 2015. (CR:336).

At the conclusion of the hearing held on June 15, 2015, during which the State argued that the trial court was without authority to suspend further execution of Hanson's sentence because Hanson, as part of his plea agreement, had waived any right to seek—or permit on his behalf—any such suspension of his sentence without the State's express, written consent, (RR4:28, 49-50); (CR:253-54, 257),

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[3] Effective January 1, 2017, article 42A of the Code of Criminal Procedure replaced article 42.12 of the Code of Criminal Procedure, purporting to be a non-substantive revision of article 42.12 in its entirety. TEX. H.B. 2299, 84TH LEG., R.S. (2015). Because the complained-of order was entered on June 25, 2015, (CR:340-46, 353-56), prior to the effective date of the revision, article 42.12 still applies here.

[4] *See* TEX. CODE CRIM. PROC. art. 42.12 § 6(a)(providing for a 180-day continuing-jurisdiction period within which a trial court may suspend further execution of a defendant's sentence and place him on community supervision).

the trial court entered an order titled, "Order Suspending Further Imposition of the Defendant's Sentence of Imprisonment and Placement on Community Supervision for the Remainder of His Sentence," along with a "First Amended Judgment" reflecting the now-suspended prison sentence, as well as the terms and conditions of Hanson's eight-year probation term. (RR4:56); (CR:340-52).[5]

In its order, the trial court set out the procedural history of the case, including the date and nature of the original indictment, the date of Hanson's guilty plea, and the fact that the trial court, pursuant to the parties' plea agreement, had sentenced Hanson to an eight-year prison term. (CR:340). Under a section titled, "The Law," the trial court set out the applicable law governing shock probation. (CR:340-42). Next, the trial court stated that Hanson met the statutory qualifications for shock probation and, thereafter, concluded that Hanson's shock-probation-plea-agreement waiver did nothing to curtail the trial court's authority to nonetheless grant him the same. (CR:342).

Ten days later, the trial court entered a second order titled, "Amended Order Suspending Further Imposition of the Defendant's Sentence of Imprisonment and Placement on Community Supervision for the Remainder of His Sentence,"

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[5] Though the trial court orally announced its ruling, it did not make any oral findings of fact. (RR4:56).

making additional fact findings that: (1) accounted for Hanson's general compliance with his bond conditions; (2) asserted that the reason for Hanson's previous release was due to medical reasons; (3) reasoned that Hanson had produced evidence that he "maintains a good relationship with his children and is in compliance with all legal support obligations" and that further incarceration would not only hinder Hanson's efforts to seek additional medical testing for himself and his children, but would also create an undue hardship on Hanson, his children, and his parents; and (5) concluded that Hanson would not benefit from further incarceration. (CR:353-56). The trial court's conclusion that Hanson met the statutory qualifications for shock probation remained unchanged. (CR:356).

On July 13, 2015, the State filed its notice of appeal, specifically indicating that it was appealing from the trial court's amended, June 25, 2015, shock-probation order, which fully set out the legal and factual bases for the trial court's ruling and order. (CR:360-62).

On July 26, 2017, in an unpublished opinion, the Eighth Court concluded that, because it was the original shock-probation order—not the amended one—that controlled the appellate timetables, the State's notice of appeal was due on July 5, 2015, such that its July 13, 2015, notice was untimely, and, as such, the Eighth Court had no jurisdiction to consider the State's appeal. *See Hanson*, 2017

WL 3167484 at *3.

ARGUMENT AND AUTHORITIES

GROUND FOR REVIEW ONE: Where, regardless of whether the shock-probation order was "original" or "amended," because it is a type of order identified as appealable under the plain language of article 44.01, and because the State's notice of appeal was filed within 20 days from the amended order's entry, the Eighth Court, in holding that the State's notice of appeal was untimely and dismissing the State's appeal for lack of jurisdiction, failed to give effect to the plain language of article 44.01 and thus erred.

> **REASON FOR REVIEW:** The Eighth Court has decided an important question of state law that has not been, but should be, settled by this Court. TEX. R. APP. P. 66.3(b).
>
> **REASON FOR REVIEW:** The Eighth Court appears to have misconstrued applicable statutes and rules. TEX. R. APP. P. 66.3(d); *see also* TEX. CODE CRIM. PROC. art. 44.01(a), (d); TEX. R. APP. P. 26.2(b).

In response to Hanson's contention that the State's appeal should be dismissed for lack of jurisdiction because, since the State's allotted, 20-day limitations period began to run from the original, June 15, 2015, shock-probation order (rather than the later, amended, June 25, 2015, shock-probation order), the State's July 13, 2015, notice of appeal was untimely, the Eighth Court—after citing to subsections (a)(2) and (d) of article 44.01 and acknowledging that the State was entitled to appeal a shock-probation order (a type of order that modifies the judgment of conviction), so long as the State filed its notice of appeal no later than 20 days after the order was signed by the trial judge—reasoned that the amended, June 25, 2015 order, though "signed...for the ostensible purpose of

adding additional findings of fact, [it] did not include substantive changes to the initial order placing Hanson on [shock probation]," and thus, the Court held, it did nothing to restart the appellate timetable, making the State's notice of appeal ten days late. *See Hanson*, 2017 WL 3167484 at *2-3. For the reasons that follow, by effectively holding that the State did not appeal from an "appealable order" when it appealed from the amended (rather than original) order, the Eighth Court, contrary to the plain language of article 44.01, improperly read an additional requirement into article 44.01 that the appealed-from order be a first-in-time, stand-alone, or sole order. *See* TEX. CODE CRIM. PROC. art. 44.01(a),(d).

When a reviewing court interprets a statute, in seeking to effectuate the collective intent or purpose of the statute's enacting legislators, the court should focus its attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment. *See State v. Robinson*, 498 S.W.3d 914, 920 (Tex.Crim.App. 2016)(citing *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App. 1991)). If, under the established canons of construction, the meaning of the statutory text should have been plain to the legislators who voted on it, the reviewing court should ordinarily give effect to that plain meaning. *See id*. Only when the plain meaning of the statute is ambiguous or would lead to absurd results that the legislature could not have

intended should the reviewing court look beyond the text and consult extratextual sources. *See id.*[6] Thus, "[w]hen the literal text of a statute is clear, an appellate court must give effect to the statute's plain language and purposely eschew reliance on its legislative history." *State v. Muller*, 829 S.W.2d 805, 808 (Tex.Crim.App. 1992).

The State's limited right to appeal is set out in article 44.01 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. art. 44.01; *see also State v. Riewe*, 13 S.W.3d 408, 411 (Tex.Crim.App. 2000)(recognizing the State's right to appeal as limited). In setting out the parameters of the State's limited right to appeal, article 44.01 identifies which types of orders the State may appeal and states, in pertinent part:

> (a) The state is entitled to appeal an order of a court in a criminal case if the order:
>
> (1) dismisses an indictment, information, or complaint...;
> (2) arrests or **modifies a judgment**;
> (3) grants a new trial;
> (4) sustains a claim of former jeopardy;
> (5) grants a motion to suppress evidence, a confession, or an admission,...; or
> (6) is issued under Chapter 64.

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[6] Similarly, a reviewing court attempts to effectuate the plain language of a court rule unless there are important countervailing considerations, though, unlike the standard for construing statutes, a reviewing court may consider extratextual factors, even in the absence of ambiguity in the rule's text or absurd results. *See Bruton v. State*, 428 S.W.3d 865, 873 (Tex.Crim.App. 2014).

TEX. CODE CRIM. PROC. art. 44.01(a)(1)-(6)(emphasis added). In setting out the limitations period within which the State must pursue an appeal permitted under the statute, article 44.01 then states:

> (d) The prosecuting attorney may not make an appeal under Subsection (a)... of this article later than the 20th day after the date on which the order, ruling, or sentence **to be appealed** is entered by the court.

TEX. CODE CRIM. PROC. art. 44.01(d)(emphasis added).[7]

The plain language of subsection (a), setting out the "types" of orders that may be appealed, indicates that the State may only take an appeal of those enumerated classes of orders—i.e., those dismissing an information or indictment, arresting or modifying a judgment, granting a new trial, etc.. *See* TEX. CODE CRIM. PROC. art. 44.01(a)(1)-(6). And in providing that the State must make its appeal within 20 days of the order "to be appealed," subsection (d) further indicates that, whatever order encompassed within the classes enumerated in subsection (a) the State chooses to appeal, it must be appealed from within 20 days. *See* TEX. CODE CRIM. PROC. art. 44.01; *see Muller*, 829 S.W.2d at 810 (similarly reasoning that the plain language of subsection (d) limits the amount of

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[7] Rule 26.2, governing the limitations periods for filing appeal in a criminal case, similarly provides that, in appeals by the State, "[t]he notice of appeal must be filed within 20 days after the day the trial court enters the order, ruling, or sentence **to be appealed**." TEX. R. APP. P. 26.2(b)(specifically setting out the time to perfect a State's appeal in a criminal case)(emphasis added).

time in which the prosecuting attorney may make an appeal and governs appeals taken under the preceding subsections (a)(1) and (a)(5)).

Reading the statute as a cohesive, integrated whole, it is apparent that, in limiting that time within which the State may take appeal of an order encompassed in subsection (a) by providing that the State must make its appeal within 20 days of the order "to be appealed," subsection (d) not only relates back to those preceding subsections defining the State's right to appeal in terms of which *types* of orders give rise to that right, but also limits the State's substantive right to appeal *only* to the extent that it requires that the order "to be appealed" fall within one of the enumerated classes set out in subsection (a). *See* TEX. CODE CRIM. PROC. art. 44.01(a)-(b), (d). That is, the State may make an appeal of any order as long as: (1) it is of a type enumerated in subsection (a); and (2) whatever the order enumerated in subsection (a) the State decides to appeal, the State makes its appeal within the allotted 20 days. *See* TEX. CODE CRIM. PROC. art. 44.01(a)-(b), (d). Thus, because an order modifying a judgment falls under one of the categories listed in subsection (a), the State is allowed to appeal such order modifying a judgment (i.e., the order "to be appealed") so long as it files notice of appeal within 20 days after the court enters the order. *See* TEX. CODE CRIM. PROC. art. 44.01(a), (d).

As such, by effectively holding that the State did not appeal from an "appealable order" when it appealed from the amended (rather than original) order, the Eighth Court improperly read an additional requirement into article 44.01, namely, that in addition to falling within one of the classes of orders enumerated in subsection (a), the order "to be appealed" must be a first-in-time, stand-alone, or sole order. *See* TEX. CODE CRIM. PROC. art. 44.01(a),(d). Such a construction is contrary to the plain language of article 44.01(d)'s requirement that the State simply appeal within 20 days after the order "to be appealed" is entered by the trial court. *Cf. In re Trentacosta*, No. 04-13-00057-CR, 2013 WL 1342468, at *1 (Tex.App.–San Antonio, April 3, 2013, orig. proceeding)(mem.op.)(not designated for publication)(under TEX. R. APP. P. 26.2(b), the defendant may appeal within 30 days of when the trial court enters an "appealable order," and an amended order denying the defendant's DNA motion was such an "appealable" order).

By construing article 44.01 as applying solely to an original order, to the exclusion of an otherwise appealable "amended" order (in that the amended order modified the judgment of conviction—an order defined as appealable under subsection (a) of article 44.01), the Eighth Court failed to give effect to the plain language of article 44.01 and thus erred in dismissing the State's appeal for lack of

jurisdiction. *See Robinson*, 498 S.W.3d at 920.

GROUND FOR REVIEW TWO: Where, by entering an amended order, the trial court indicated its intent to supercede its original shock-probation order, and where the trial court's amended order contained additional fact findings that were a statutory prerequisite to the proper granting of shock probation, the Eighth Court erred in holding that it was the original (not the amended) order that constituted an "appealable" order. The State's notice of appeal from the amended order was therefore timely.

> **REASON FOR REVIEW:** The Eighth Court has decided an important question of state law that has not been, but should be, settled by this Court. TEX. R. APP. P. 66.3(b).

I. Where the trial court indicated its intent to replace its original order, the amended order superceded the original order, making the State's appeal therefrom proper and timely.

As discussed above, the Eighth Court held that because the amended shock-probation order did not include any "substantive" changes to the original order and (unlike the original order) did nothing to modify the judgment of conviction, it did not restart the appellate timetables, such that the State was required to file its notice of appeal within 20 days of the *original* order for it to be timely. *See Hanson*, 2017 WL 3167484 at *2-3. In doing holding, the Eighth Court rejected the State's contention that because the amended order replaced and superceded the original order, its notice of appeal, filed before the expiration of 20 days from the June 25, 2015, amended order, was timely. *See Hanson*, 2017 WL 3167484 at *2-3.

This aspect of the Eighth Court's reasoning was based on its refusal to apply

basic procedural principles that, although developed in the civil context, should apply equally in the criminal context. *See State v. Antonelli*, No. 05-99-01907-CR, 2001 WL 29153, at *2 (Tex.App.–Dallas, Jan. 12, 2001)(reasoning that although the legal principles dictating which order survives when a trial court enters an amended order arose in the context of civil disputes, "the well-established concepts they assert are equally applicable in criminal cases"), *rev'd*, *State v. Antonelli*, No. PD 958-01 (Tex.Crim.App., Sept. 11, 2002)(not designated for publication).[8, 9]

One such basic principle is that when a trial judge enters an amended order, rather than a supplemental order, it is presumed to have intended to replace its original order. As the State noted in its notice of appeal, *see* (CR:360-62), regardless of whether the additions in the amended order were material or

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[8] In its unpublished opinion on discretionary review, this Court reversed the San Antonio Court of Appeals' holding that, because the trial court's amended order—which contained the "full ruling of the court" on appellee's motion to quash—superceded the original order, the original, superceded order, was not appealable. *See State v. Antonelli*, slip op. at 3-4, 6-7. This Court reasoned that the "second-judgment" rule developed in civil case law was inapplicable in a criminal context in which an original order (rather than a judgment) contained a ruling and a second order contained the "reasoning or legal conclusion supporting that ruling." *See id.* at 6-7. Instead, this Court reasoned that the second order, regardless of its title and the trial court's statement that it reflected the "entire order," was not a "stand-alone" order and did not, in itself, dispose of the motion to quash. *See id.* at 5. However, for reasons that will be discussed below, the facts of this case are distinguishable, such that the trial court's amended order was, indeed, "appealable."

[9] Because this Court's unpublished opinion is not available on Westlaw, the State obtained a copy of the opinion directly from this Court (attached hereto).

substantial, because the trial court is presumed to have intended to replace its original order by entering an amended order, the appellate timetables start from the entry of the amended order rather than the original. *Cf. Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988)("We hold that any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power, operates to delay the commencement of the appellate timetable until the date the modified, corrected or reformed judgment is signed."); *City of West Lake Hills v. State ex rel. City of Austin*, 466 S.W.2d 722, 727 (Tex. 1971)(when the trial court enters an amended or corrected order, it is presumed that the trial court intended to replace the original order, such that the appellate timetables start from the entry of the amended order).

To hold otherwise would lead to the illogical conclusion that the State must appeal from a subsequently superceded, nullified order, as, once amended, the original order ceases to have legal effect and is no longer susceptible to appeal. *See Black v. Shor*, 443 S.W.3d 170, 175-76 (Tex.App.–Corpus Christi 2013, no pet.)(holding that for purposes of determining what constituted the appealable order, the amended order is the appealable order: "Ordinarily, an amended final order supercedes any prior final order when the 'order amounts to something more than marking through an earlier date and substituting another date on the final

order.'...When the trial court signs an amended order, the original order becomes 'a nullity.'...As the original judgment ceases to have legal effect, only the amended judgment can support an appeal."); *Ferguson v. Naylor*, 860 S.W.2d 123, 127 (Tex.App.–Amarillo 1993, writ denied)(holding that once a judgment or order has been reformed, it is superceded and is effectively dead and not susceptible to appeal).

As such, the State's appeal from the trial court's amended order, which the trial court intended to replace its previous, original order, was timely and proper, and the Eighth Court's holding to the contrary was erroneous. *See Shor*, 443 S.W.3d at 175-76; *City of West Lake Hills*, 466 S.W.2d at 727.

II. Where it was in the trial court's *amended* order that it satisfied, via its additional fact findings, the statutory requirements for the proper granting of shock probation, such "substantive" changes were sufficient to make the amended order "appealable."

The Eighth Court's characterization of the amended order as a "non-substantive" order notwithstanding, here, the trial court rendered in its amended order previously unpronounced findings of fact that were not only a result of judicial reasoning and determination, but were also a necessary prerequisite for the trial court's shock-probation ruling. By expressly providing that a trial judge may suspend further execution of a defendant's sentence "if in the opinion of the judge

the defendant would not benefit from further imprisonment," *see* TEX. CODE CRIM. PROC. art. 42.12 § 6 (a), the shock-probation statute expressly requires that a trial judge first make such a determination before shock probation may properly be granted. *See State v. Dean*, 895 S.W.2d 814, 815 (Tex.App.–Houston [14th Dist.] 1995, pet. ref'd); *State v. Lima*, 825 S.W.2d 733, 734 (Tex.App.–Houston [14th Dist.] 1992, no pet.)(cases holding that the shock-probation statute requires that the trial judge find that the defendant would not benefit from further incarceration).

In its amended order, the trial judge additionally determined that: (1) Hanson generally complied with all previous bond conditions; (2) the reason for Hanson's previous release was due to medical reasons; (3) Hanson "maintains a good relationship with his children and is in compliance with all legal support obligations;" and (4) further incarceration would not only hinder Hanson's efforts to seek additional medical testing for himself and his children, but would also create an undue hardship on him, his children, and his parents—all of which, in turn, provided the underlying factual bases for the trial court's ultimate conclusion that, "[f]urther imprisonment would not benefit [Hanson]." (CR:353-56). Thus, it was in its amended, June 25, 2015, order that the trial court, for the first and only time, satisfied all statutory prerequisites of the shock-probation statute, and thus, it

was the amended order that operated to properly complete the granting of shock probation and suspension of further execution of Hanson's sentence. *See Dean*, 895 S.W.2d at 815; *Lima*, 825 S.W.2d at 734.

Simply, unlike the amended order in *Antonelli* —which merely "explained" the trial court's previous ruling—the amended order in this case was a stand-alone order that, for the first and only time, fully dispensed of the trial court's *sua sponte* motion for shock probation. As such, *Antonelli* does not apply here.

And as the San Antonio Court of Appeals further suggested in *Ex parte Matthews*, the additional determination of a fact, which is defined as a judicial determination on the evidence before a judge, may serve to restart the appellate timetables if made within a trial court's 30-day plenary-power period. *See Ex parte Matthews*, 452 S.W.3d 8, 13-14 (Tex.App.–San Antonio 2014, no pet.)(holding that because the trial court entered its findings of fact after its plenary power had expired, "they could not...extend or reset the appellate timetable," implying that if the findings had been entered before the expiration of the court's plenary power, they would have reset the appellate timetables); BLACK'S LAW DICTIONARY (10th ed. 2014).

Thus, by not only designating its subsequent order as "amended," but also undertaking—for the first time—to properly fulfill the statutory requirements for

the grant of shock probation, the trial court manifested its intent that its amended order be the sole, legally effective order and to nullify its original order. Consequently, even if it did not misconstrue the plain language of article 44.01, the Eighth Court erred in holding that the State erroneously and untimely appealed from the amended order and dismissing the State's appeal for lack of jurisdiction. *See Ex parte Matthews*, 452 S.W.3d at 13-14; *Dean*, 895 S.W.2d at 815; *Lima*, 825 S.W.2d at 734.

CONCLUSION

In holding that the trial court's amended shock-probation order, despite being a type of order identified as appealable under the plain language of article 44.01, was not "appealable," the Eighth Court failed to give effect to the plain language of article 44.01 and thus erred. Furthermore, where the trial court not only indicated its intent to supercede its original order, but also made additional judicial determinations that were a statutory prerequisite for the proper granting of shock probation in the first place, the trial court's amended order contained "substantive" changes sufficient to make it a stand-alone, "appealable" order. For these reasons, this Court should reverse the judgment of the Eighth Court and hold that the State's appeal from the amended, June 25, 2015, shock-probation order was proper, that its July 13, 2015, notice of appeal was timely, and that the State's

appeal was thus properly before the Eighth Court.

PRAYER

WHEREFORE, the State prays that this petition for discretionary review be granted and that, upon hearing, the Court reverse the Eighth Court's judgment and remand this case to the Eighth Court for consideration of the merits of the State's appeal.

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

/s/ Raquel López
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ATTORNEYS FOR THE STATE

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the factual summary on page 1 through and including the prayer for relief on page 20, contains 4,299 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Raquel López
RAQUEL LOPEZ

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on August 25, 2017, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to appellant's attorney: Ruben P. Morales, rbnpmrls@gmail.com.

(2) The undersigned also does hereby certify that on August 25, 2017, a copy of the foregoing petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Raquel López
RAQUEL LOPEZ

APPENDIX

1. COURT OF APPEALS' OPINION

2. COURT OF CRIMINAL APPEALS' OPINION (STATE V. ANTONELLI)

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS, Appellant,	§	No. 08-15-00205-CR
v.	§	Appeal from the 243rd District Court
CRISPEN HANSON, Appellee.	§	of El Paso County, Texas
	§	(TC# 20120D03212)

O P I N I O N

The State of Texas is appealing from an order of the trial court placing Appellee, Crispen Hanson, on shock probation. *See* TEX.CODE CRIM.PROC.ANN. art. 44.01(a)(2)(West Supp. 2016)(permitting State to appeal an order which arrests or modifies a judgment). Finding that the State did not timely file its notice of appeal, we dismiss the appeal for lack of jurisdiction.

FACTUAL SUMMARY

Appellee, Crispen Hanson, was charged by indictment with capital murder (Count I), murder (Count II), and injury to a child (Counts III and IV) in cause number 20120D03212. The State dismissed Counts I and II in exchange for Hanson's plea of guilty to Counts III and IV, and the trial court assessed Hanson's punishment in accordance with the plea bargain at imprisonment for a term of eight years. The judgment included a delayed surrender date of February 2, 2015, but the trial court granted Hanson's motion to extend the surrender date to March 16, 2015. Hanson filed another motion seeking an extension of the surrender date allegedly due for medical

reasons, but the trial court did not conduct a hearing before the surrender date, and Hanson surrendered himself on March 16, 2015 in compliance with the trial court's order. Hanson subsequently filed a motion requesting that he be released on bond. On April 14, 2015, the trial court entered an order granting Hanson's motion to be released on bond and releasing Hanson from custody.

On May 13, 2015, the State filed a mandamus petition to challenge the order releasing Hanson order, and we requested that Hanson filed a response no later than July 1, 2015. *See In re State of Texas*, cause no. 08-15-00161-CR. On June 11, 2015, the trial court filed a document titled "Sua Sponte Motion to Hold a Hearing to Determine Whether to Suspend the Remainder of the Defendant's Prison Sentence and Place the Defendant on Community Supervision." Following a hearing, the court entered an order on June 15, 2015, suspending further imposition of Hanson's prison sentence and placing him on shock probation. The order included findings of fact, seven numbered paragraphs setting forth applicable law, and three concluding paragraphs addressing the trial court's conclusion that Hanson qualified for community supervision. On that same date, the trial court entered an amended judgment of conviction reflecting that Hanson had been placed on community supervision for eight years. Further, the trial court signed an order on June 15, 2015 establishing the terms and conditions of community supervision. The court signed on amended order on June 25, 2015 which included fourteen additional findings of fact not contained in the June 15, 2015 order, but the amended order did not include any substantive changes. The State filed written notice of appeal on July 13, 2015.

JURISDICTION

Hanson contends in his brief that the appeal should be dismissed for lack of jurisdiction because the State did not file its notice of appeal within twenty days after the trial court signed the

June 15, 2015 order. The State responds that it is appealing the amended order signed by the trial court on June 25, 2015, not the June 15, 2015 order, because the amended order replaced the earlier order and re-started the appellate timetable.

Under Article 44.01(a)(2), the State is permitted to appeal an order which arrests or modifies a judgment. *See* TEX.CODE CRIM.PROC.ANN. art. 44.01(a)(2). Because an order granting shock probation modifies the judgment of conviction, the State has a right to appeal the order under Article 44.01(a)(2). *State v. Robinson*, 498 S.W.3d 914, 919 (Tex.Crim.App. 2016). The prosecuting attorney must file the notice of appeal no later than twenty days after the date on which the order, ruling, or sentence to be appealed is entered by the court. *See* TEX.CODE CRIM.PROC.ANN. art. 44.01(d); TEX.R.APP.P. 26.2(b)("The notice of appeal must be filed within 20 days after the day the trial court enters the order, ruling, or sentence to be appealed."). The appellate timetable begins to run on the date the trial judge signs the order. *See State v. Wachtendorf*, 475 S.W.3d 895, 897 (Tex.Crim.App. 2015); *State v. Rosenbaum*, 818 S.W.2d 398, 402 (Tex.Crim.App. 1991); *State ex rel. Sutton v. Bage*, 822 S.W.2d 55, 57 (Tex.Crim.App. 1992). The deadline established by Article 44.01(d) is more than a mere procedural deadline; it is a substantive limit on the State's authority to appeal. *State v. Rollins*, 4 S.W.3d 453, 454 (Tex.App.--Austin 1999, no pet.), *citing State v. Muller*, 829 S.W.2d 805, 812 (Tex.Crim.App. 1992).

In his notice of appeal, the District Attorney expressly stated that he was appealing the trial court's amended order dated June 25, 2015. The record shows, however, that the trial court modified Hanson's sentence on June 15, 2015 by entering the order granting shock probation and by signing an amended judgment placing him on community supervision for eight years. While the trial court signed an amended order on June 25, 2015 for the ostensible purpose of adding additional findings of fact, the amended order did not include any substantive changes to the initial

order placing Hanson on community supervision for eight years.

The issue before us is whether the entry of the amended shock probation order re-started the appellate timetable. Citing several civil cases, the State argues that the amended shock probation order replaced or superceded the June 15, 2015 order, and therefore, the appellate timetable re-started on June 25, 2015 with the entry of the amended order.[1] The Rules of Civil Procedure and the Rules of Appellate Procedure contain rules addressing when the appellate timetable begins to run in a civil case, and a body of law applying these rules and related concepts has developed. *See* TEX.R.CIV.P. 306a, 329b; TEX.R.APP.P. 4.3. These rules and concepts are not applicable to a criminal appeal by either the defendant or the State.[2]

The June 15, 2015 shock probation order modified the judgment of conviction and it is this modification of the final judgment of conviction which gives rise to the State's right to appeal under Article 44.01(a)(2). The trial court entered an amended judgment of conviction on June 15, 2015 to reflect the modification and the court also signed orders establishing the terms and conditions of community supervision on that same date. The amended shock probation order signed by the trial court on June 25, 2015 added findings of fact, but it did not modify the amended judgment of conviction in any way. Under the unique facts of this case, we conclude that the appellate timetable began running on June 15, 2015 when the trial court modified the final

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[1] The State cites *Check v. Mitchell*, 758 S.W.2d 755 (Tex. 1988), *City of West Lake Hills v. State ex rel. City of Austin*, 466 S.W.2d 722 (Tex. 1981), *Black v. Shor*, 443 S.W.3d 170 (Tex.App.--Corpus Christi 2013, no pet.), and *Ferguson v. Naylor*, 860 S.W.2d 123 (Tex.App.--Amarillo 1993, writ denied).

[2] For example, the State relies on the Supreme Court's decision in *Check v. Mitchell* which holds that "any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power, operates to delay the commencement of the appellate timetable until the date the modified, corrected or reformed judgment is signed." *Check*, 758 S.W.2d at 756. In reaching this conclusion, the Texas Supreme Court applied Texas Rule of Civil Procedure 329b(h) which provides that "[i]f a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed…." TEX.R.CIV.P. 329b(h). Rule 329b is inapplicable to criminal cases, and the Code of Criminal Procedure does not contain a similar provision. Consequently, *Check v. Mitchell* is not controlling and it does not assist our analysis of the jurisdictional issue presented here.

judgment of conviction, and the entry of the amended shock probation order did not re-start the appellate timetable. Under Article 44.01(d), the State's notice of appeal was due to be filed no later than July 5, 2015. The notice of appeal filed on July 13, 2015 was untimely. Accordingly, we dismiss the appeal for lack of jurisdiction.

ANN CRAWFORD McCLURE, Chief Justice

July 26, 2017

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

(Do Not Publish)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 958-01

THE STATE OF TEXAS, Appellant

v.

LOUIS ANTONELLI

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

Cochran, J., ***delivered the opinion for a unanimous Court.***

OPINION

The State appealed from an order granting appellee's motion to quash. The court of appeals dismissed the State's appeal because it found that the order from which the State was attempting to appeal was not, in fact, an appealable order, having been superseded by a later, amended order. We

granted review to determine whether the court of appeals properly dismissed the State's appeal.[1] We find that it did not.

I.

Appellee was indicted for violating Texas Election Code section 255.001, Required Disclosure on Political Advertising,[2] after an anonymously published newspaper, entitled the "Cedar Hill Free Press," urged city residents to vote against three candidates for Cedar Hill's City Council.[3]

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[1] We granted review on the following two grounds:

1) Whether the court of appeals erred in selectively and harshly applying civil appellate rules to a criminal appeal instead of purposefully less stringent criminal appellate rules?
2) Whether, because the trial court's second order cannot stand independently, and is only effective if it incorporates the first order, the court of appeals erred in dismissing the State's appeal because it referred to the date of the only order quashing the indictment.

[2] Section 255.001 states:

(a) A person may not knowingly enter into a contract or other agreement to print, publish, or broadcast political advertising that does not indicate in the advertising:
  (1) that it is political advertising;
  (2) the full name of either the individual who personally entered into the contract or agreement with the printer, publisher, or broadcaster or the person that individual represents; and
  (3) in the case of advertising that is printed or published, the address of either the individual who personally entered into the agreement with the printer or publisher or the person that individual represents.

(b) This section does not apply to tickets or invitations to political fund-raising events or to campaign buttons, pins, hats, or similar campaign materials.

(c) A person who violates this section commits an offense. An offense under this section is a Class A misdemeanor.

TEX. ELEC. CODE § 255.001 (Vernon Supp. 2002).

[3]The paper characterized itself as "printed and paid for through private funds" and "meant as a means to get the truth out about some of the candidates for office in Cedar Hill." It also remarked on its own anonymity: "The anonymity of the people who bring this publication to you is not out of shame or an attempt to elude responsibility, but rather a healthy regard for the unsavory associations and activities of some of our so-called civic leaders."

Appellee filed a motion to quash the indictment, alleging that section 255.001 was unconstitutional both on its face and as construed and applied to him.

Appellee argued that section 255.001 violated his freedom of speech and press in violation of the United States and Texas Constitutions and his right to equal protection under the United States Constitution. The State filed a response, requesting that the court deny the motion to quash because it was not sufficiently specific. Alternatively, in the event the motion were granted, the State asked the court to answer five questions. Each proposed question related to either the court's reasoning in granting the motion or the scope of the ruling.[4]

The court's hearing on the motion began on October 8, 1999. The court recessed without ruling. When the hearing resumed on October 22, 1999, the court noted that it had already found section 255.001 unconstitutional in another case, and therefore granted the motion. The court also read its answers to the State's five questions into the record, stating that: 1) its ruling was based on the First Amendment; 2) defendant's freedom of speech was implicated; 3) defendant's freedom of press was not implicated; 4) the statute is unconstitutional as it was applied to defendant; and 5) the statute is facially unconstitutional. The court's written order, signed and dated October 22, 1999, granted appellee's motion to quash, dismissed the cause, and discharged appellee and his sureties.

Then, on November 3, 1999, the trial court filed an "Amended Order." In that order, the trial court stated that it had granted appellee's motion to quash on October 22, 1999, noted that the original order was incomplete in that it did not state the full ruling of the court, and proceeded to explain that ruling.

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[4]The State asked that the court specify the constitutional provision behind its ruling, whether the defendant's freedom of speech or press had been implicated, and whether the statute was unconstitutional on its face or as it was applied to appellee.

Two days later, on November 5th, the State appealed the October 22nd order. The court of appeals dismissed the appeal. That court, guided by civil cases, determined that the November 3rd order was intended to supercede and replace the October 22nd order because: 1) it was entitled "amended order"; and 2) it purported to reflect the full ruling of the court and noted that the earlier order did not do so.[5] The court of appeals concluded that, because the November 3rd order superceded the October 22nd order, the original order was not appealable, and thus the State presented nothing for review.[6] In essence, the October 22nd order never existed. *State v. Antonelli*, No. 05-99-01907-CR (Tex. App. – Dallas 2001) (not designated for publication).

II.

The State asks whether: 1) the court of appeals' consideration of the line of civil cases was

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[5]The court of appeals cited to the "*Mullins* line," *Mullins v. Thomas,* 136 Tex. 215, 217-18, 150 S.W.2d 83, 84 (1941), and the "*City of Westlake Hills* line," *City of Westlake Hills v. State*, 466 S.W.2d 722, 726-27 (Tex. 1971). From these cases and their progeny, the court distilled the following principles:

1) A second judgment does not automatically vacate the first; rather, the record must show that the trial court intended to vacate the first judgment and replace it with the second judgment;
2) If the trial court intended the second judgment to vacate the first, then the first judgment is presumptively vacated;
3) Texas courts have consistently found an intent to vacate the original judgment when a second judgment is entered as and titled a "corrected" or "amended" judgment;
4) It is not necessary that the second judgment expressly state that the first judgment is vacated; and
5) Under rule 329b of the Texas Rules of Civil Procedure, if a subsequently entered judgment modifies, corrects or reforms the previously entered judgment, that judgment restarts the appellate timetable and presumptively vacates the original judgment.

[6] The court of appeals said that the State "conceded" at oral argument that the November 3rd order "superceded" the October 22nd order. The State suggests that this characterization might be a misunderstanding. Regardless, we are not bound by a party's concession. *See Saldano v. State,* 70 S.W.3d 873, 884 (Tex. Crim. App. 2002).

appropriate; and 2) whether the trial court's second order can stand independently of the original order in disposing of the motion to quash. We find that the answer to the second question is "No." The second order, regardless of its title, and regardless of the trial court's statement that it reflected the entire order did not itself dispose of the motion to quash. Viewing the orders side by side makes that conclusion clear:

Order Sustaining Motion to Quash	**Amended Order**
On this day after hearing pleadings, any evidence offered and received and argument of counsel, Defendant's Motion to Quash is hereby granted. This cause is dismissed. Defendant and his sureties are discharged.	This Court ruled on the Defendant's Motion To Quash on October 22, 1999. The Court granted Defendant's Motion; however, the Order signed by this Court on October 22, 1999 does not reflect the full ruling of the Court. This Amended Order does. The Court finds that Texas Election Code Section 255.001 violates the freedom of speech clause of the First Amendment to the United States Constitution as it is applied to the Defendant in this cause. The Court also finds that Section 255.001 is unconstitutional on its face for the same reason.
filed October 22, 1999	*filed November 3, 1999*

The November 3rd order does not supercede or "cancel out" the October 22nd order. The November 3rd order has no independent legal significance; it cannot stand alone. Only the October 22nd order grants the motion. Only the October 22nd order dismisses the cause. Only the October 22nd order discharges appellee and his sureties.[7] The November 3rd order does not actually "order" any action at all; rather it explains the ruling entered on October 22nd. It reduces to writing the trial court's oral findings stated on the record on October 22nd. The October 22nd order grants the motion to quash; the November 3rd order explains why.

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[7] The October 22nd order is recorded on the docket sheet. The November 3rd order is not.

III.

The court of appeals erred in concluding that the October 22, 1999 order was not an appealable order. The Texas civil cases cited by the court of appeals which address the issue of which judgment survives when two or more are entered are not relevant in this particular case.[8]

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[8] The cases cited by the court of appeals generally dealt with judgments, not orders. In *Mullins v. Thomas*, the court held that when nothing showed that the first judgment (stating that the rights of the parties are determined as specified in the agreement contract) was vacated, the second judgment (awarding plaintiffs judgment against defendants in the sum of $2,304.95 with six per cent interest thereon) was a nullity and the time of appeal must be measured by the date of the first one. 136 Tex. at 218, 150 S.W.2d at 84. In *City of Westlake Hills v. State*, the court determined that the"Corrected Final Judgment" controls (and determines the appellate time table) over the earlier filed "Judgment" when the corrected judgment provides for the payment of costs of court, but the earlier judgment is silent in that respect. 466 S.W.2d at 726-27. The court relied on the fact that the later judgment "corrected" the first judgment, and so effectively vacated and set aside the earlier judgment. *Id. Mullins* and *City of Westlake* sort out what "the" judgment is because normally there can be only one final judgment. *See* TEX. R. CIV. P. 301 ("Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law.")

In a more recent case, the Texas Supreme Court held that "[a]ny change, whether material or substantial, made in a judgment while the trial court retains plenary power, operates to delay the start of the appellate timetables until the date the modified, corrected, or reformed judgment is signed." *See Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988). The Austin court of appeals reconciled the *Mullins* line and *Check* as follows:

> Neither Rule 329b(h) nor *Check* require that the modified, corrected, or reformed judgment indicate the trial court's intent to vacate the first judgment before the second judgment will be given effect. We believe that the supreme court's promulgation of Rule 329b(h) and its decision in *Check* mean that any change in a judgment made by the trial court during its period of plenary power should be treated as a modified, corrected, or reformed judgment that presumptively vacates the trial court's former judgment unless the record indicates a contrary intent.

Owens-Corning Fiberglas Corp. v. Wasiak, 883 S.W.2d 402, 411 (Tex. App. – Austin 1994), *aff'd sub nom, Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1998); *see also Quanaim v. Frasco Rest. & Catering & Fracso, Inc.*, 17 S.W.3d 30, 40 (Tex. App. – Houston [14th Dist.] 1999, pet denied) (trial court's second summary judgment order "identifying different grounds for summary judgment" than in first order is a change sufficient to restart appellate timetable and is only final judgment in case). In *Quanaim*, the court of appeals stated that its holding "honors the Texas Supreme Court's objective that we endeavor to construe procedural

Therefore, we reverse the dismissal of the State's appeal, and remand this case to the court of appeals for consideration of the merits.

Cochran, J.

Delivered: September 11, 2002

DO NOT PUBLISH

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rules reasonably yet liberally so that a litigant does not lose his right to appeal through the imposition of a requirement not absolutely necessary to effectuate the purpose of a rule." *Id.* Thus, the "second judgment" rule is, at least in part, intended to *preserve* a litigant's right to appeal, not *extinguish* it.

Moreover, in none of the above cases was the court presented with one order that contained a ruling, and another that contained the reasoning or legal conclusion supporting that ruling.