Court of Criminal Appeals Caselaw Update

Hon. Judge Robert C. Richardson

&

Hon. Judge Jesse F. McClure, III

Chavez v. State, 666 S.W.3d 772 (CCA 2023)

- Non-death capital murder – multiple co-defendants.
- Defendant wants lesser included offenses of murder and kidnapping in jury charge.
- Judge says:

The Argument…

Appellee:

- I pleaded not guilty; and you could have doubt about my intent.
- It wasn't my plan, I didn't pull the trigger, I wasn't there the whole time, so…
- A rational jury could have found me guilty of just the lesser.

CCA:

- The question is: whether there is evidence that he is only guilty of the lesser.
- None of the evidence cited by Appellant… rebuts or negates the evidence that Appellant had the intent to kill when the victims were killed.
- "They might not believe" =/= "Evidence that he is only guilty of lesser".

Bottom Line: “A trial judge's job under the guilty-only prong is to **consider the admitted evidence and determine whether it is sufficient to support submission** of a LIO instruction” Page 778

Taylor v. State, 667 S.W.3d 809 (Tex. Crim. App. 2023)

Appellant: My right to a speedy Trial was denied.

COA: You didn’t show your work. The Trial Court did not conduct a meaningful hearing which precludes review.

Well actually…

No specially-designated hearing is required before the *Barker* factors be weighed.

"[T]he only requirement is that the relevant information be in the record — the length of the delay, reason for the delay, assertion of the right, and prejudice."

State v. Torres, 666 S.W.3d 735 (Tex. Crim. App. 2023)

Appellee, a juvenile, is suspected of murder.

Magistrate reads the required warnings prior to an interview and request the juvenile be returned to him following the interview to assess voluntariness.

The juvenile revealed the victim's location during the interview. The juvenile was never returned to the magistrate.

COA

Trial Court: Officers did not comply with the plain language of § 51.095(f). The COA affirms.

The magistrate has discretion to exercise their power under Tex. Fam. Code § 51.095(f) but once invoked…

- **Admissibility is conditional on the magistrate's finding.**

State

The term “**uses**” as used in § 51.095(f) means to use completely.

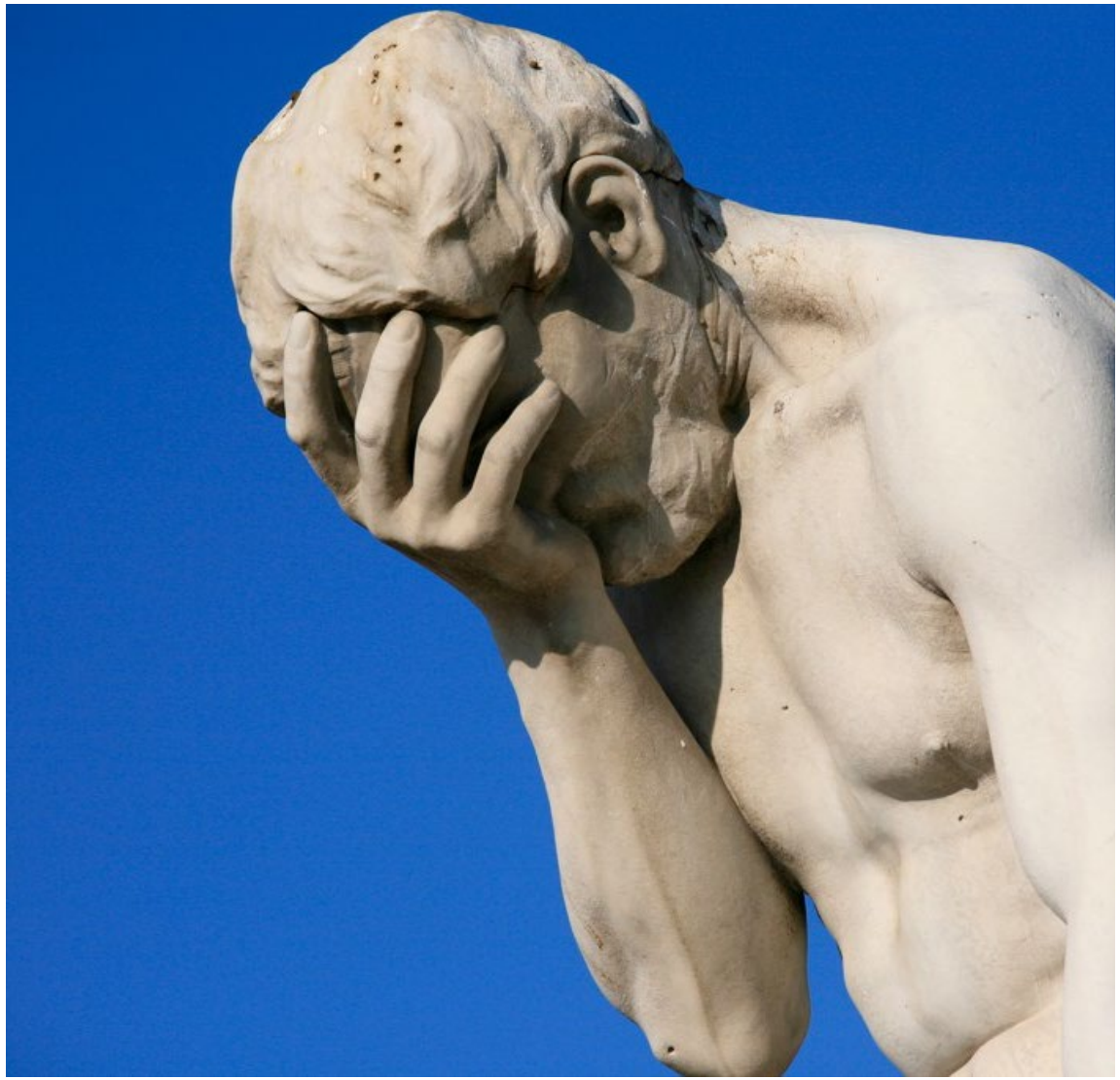
- **Because the magistrate never made a determination then the statements are admissible.**

CCA

The State’s construction frustrates the statues import.

It would allow its purpose to be thwarted by an actor who is not **neutral, detached, or disinterested**.

“The officers did not use the procedure, but Section 51.095(f)'s exclusionary rule hinges on only one specific person's "use" of the procedure—the magistrate.”



Ex Parte Rodney Reed, 2023 Tex. Crim. App. Unpub. LEXIS 299

- Takeaways:
  - In Actual Innocence claims, Court takes account of the whole record, including extraneous offenses proved in punishment and the credibility of the "newly discovered" witnesses.
  - *Brady* violations presupposes that the evidence exists to begin with.

King v. State, 670 S.W.3d 653 (CCA 2023) "I forgot the phone… Can you get it?"

- King was a truck driver.
- Didn't own the truck but slept in it.
- King arrested – simultaneous search warrant for the truck, phone mentioned.
- Police forgot to get it.
- King never out of custody again…
- At least 10 days later, owner of the truck called by police, opens truck to get phone.
- Motion to suppress denied…

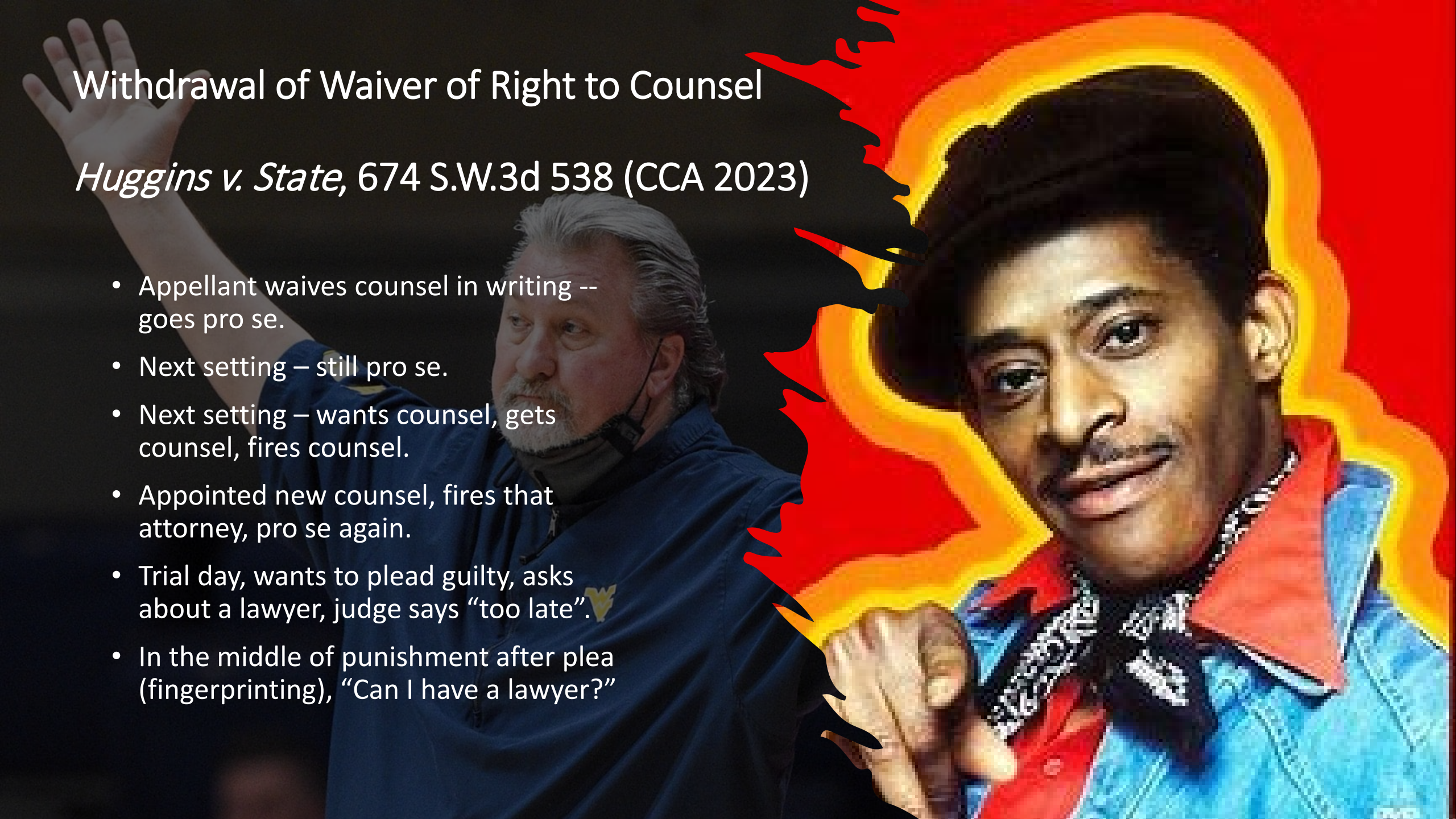
King Takeaways

- ON THIS RECORD!!! - no expectation of privacy.
- Standing – burden always on the Defendant.
- Did not demonstrate that he retained an expectation of privacy in a truck he did not own, after he was arrested and remained in custody.

Withdrawal of Waiver of Right to Counsel

Huggins v. State, 674 S.W.3d 538 (CCA 2023)

- Appellant waives counsel in writing -- goes pro se.
- Next setting – still pro se.
- Next setting – wants counsel, gets counsel, fires counsel.
- Appointed new counsel, fires that attorney, pro se again.
- Trial day, wants to plead guilty, asks about a lawyer, judge says “too late”.
- In the middle of punishment after plea (fingerprinting), “Can I have a lawyer?”



Takeaways from *Huggins*...

- Right to withdraw waiver of counsel is not absolute.
- “A defendant may not use his right to counsel to manipulate the court.”
- When a defendant wants to withdraw waiver:
  - Aware of the dangers of pro se?
  - Waiver knowing, voluntary, and intelligent?
  - Sufficiently warned?
  - Does the withdrawal appear to be manipulative?

McPherson v. State, 677 S.W.3d 663 (CCA 2023)

Driver throws brown objects outside of his car as a Trooper tries to stop him.

The Trooper doubles back to find five joints…

Appellant is convicted of tampering.

COA Reverses

The Trooper's inability to keep the marijuana in sight and his need to double back did not prove concealment.

Appellant's actions essentially revealed what was previously concealed; the trooper knew here the marijuana landed and it was easily retrieved.

CCA:

- An item is concealed when it is “hidden, removed form sight or notice, or kept from discovery or observation.” *Stahmann*, 602 S.W.3d at 581.
- The joints weren’t revealed to the trooper.

Johnson v. State, 680 S.W.3d 616 (CCA 2023)

"…there is no evidence that Appellant's attempted failure to comply with his duties of giving information caused any of the damage in this case."

- Johnson hit a utility pole – charged with failing "to impart certain information to the owner or person in charge of the fixture" he damaged.
- Opinion: "… the criminal offense for which the defendant is convicted must be the cause of the damage for which restitution is awarded."
- His failure to call the owner didn't cause the damage.
- *Question for another day: Can the State and Defense agree?*

When the Caption of the Indictment Does Not Match the Body of the Indictment…

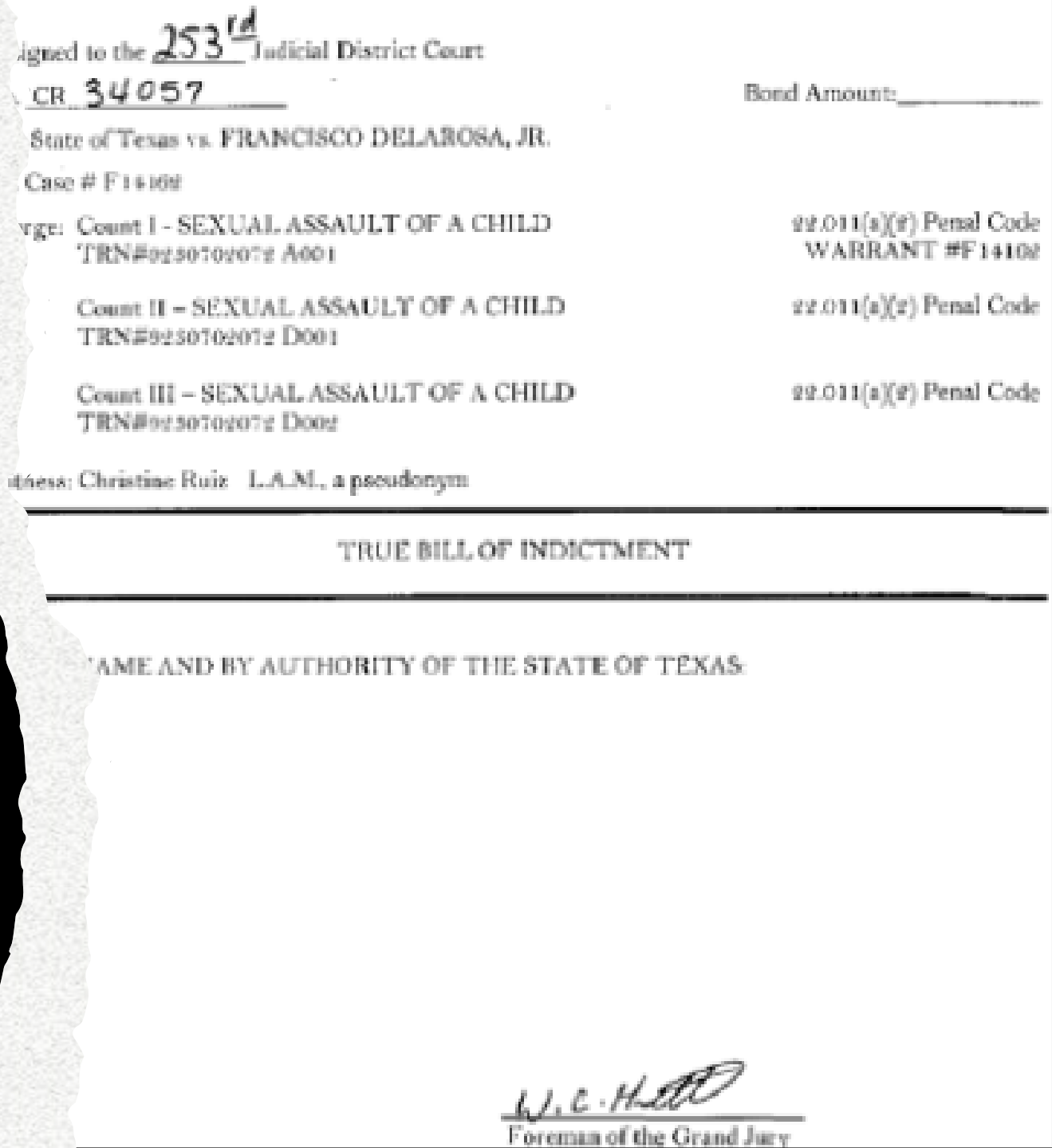
Delarosa v. State, 677 S.W.3d 668 (CCA 2023)

- Indictment Title: Sexual Assault of a Child
- Language in the Body: "…another person, without that person's consent…"
- Complainant: Was "in love" with Appellant but "I'm not in his chains anymore."
  - No one asked if she had consented.

CCA: Body of indictment alleges a complete offense, the caption is irrelevant, and since the State failed to prove lack of consent…

Caption of Delarosa's Indictment

- Presiding Judge Keller's Dissent:
  - We use captions for jurisdictional questions, so why can't we do this here?
- Judge Yeary Dissent:
  - Evidence was sufficient for conviction, so…



igned to the 253rd Judicial District Court

CR 34057 Bond Amount:_____

State of Texas vs. FRANCISCO DELAROSA, JR.

Case # F14108

rge: Count I - SEXUAL ASSAULT OF A CHILD — 22.011(a)(2) Penal Code
TRN#9250702072 A001 — WARRANT #F14108

Count II – SEXUAL ASSAULT OF A CHILD — 22.011(a)(2) Penal Code
TRN#9250702072 D001

Count III – SEXUAL ASSAULT OF A CHILD — 22.011(a)(2) Penal Code
TRN#9250702072 D002

dress: Christine Ruiz L.A.M., a pseudonym

TRUE BILL OF INDICTMENT

AME AND BY AUTHORITY OF THE STATE OF TEXAS

W. C. Hall
Foreman of the Grand Jury

Rogers v. State, 677 S.W.3d 705 (CCA 2023)

Feeds, shoots, and leaves…

- A mess:
  - Conviction
  - Court of Appeals Affirms
  - PDR Granted
  - CCA Remands
  - Court of Appeals Affirms
  - CCA Reverses…

And then…

- Rogers dies during the pendency of the appeal.
- If someone dies during appeal, their appeal is abated.
- Which, once again*, means
- Just like Jack Ruby was never convicted of murdering Lee Harvey Oswald, Rogers was never finally convicted in this case.

* As someone once said, his appeal now goes to a higher court…

Jack Ruby Rabbit Trail

Remember, I speak only for myself.

He got the death penalty for killing the killer of a popular President…

My favorite example of the right to a jury trial – he killed a guy on international TV.

CCA ruled that he should have not been tried in Dallas County, because… Also, his statement was improperly admitted.

He died before his re-trial could happen in Wichita Falls… Cancer .

Back to the Show… *Rogers* Takeaways
Rogers v. State, 677 S.W.3d 705 (CCA 2023)

- Providing a self-defense instruction does not require the judge to believe Defendant acted in self-defense.
- Don’t keep the attorneys from discussing it in voir dire.
- Don’t pronounce voir dire like you’re French. Ask my BA…
- Don’t deny a jury charge because you’re mad.
- Don’t limit a lawyer’s ability to make a bill.
- Read the Rogers opinions attached to the abatement -- *Rogers v. State*, 677 S.W.3d 705 (CCA 2023)

Williams v. State, 2024 Tex. Crim. App. LEXIS 3

Is there such thing as too much notice?

Background

- "Appellant's indictment alleged all of the statutory methods" of the offense.
- "…own, invest in, finance, control, supervise, or manage…"

Appellant

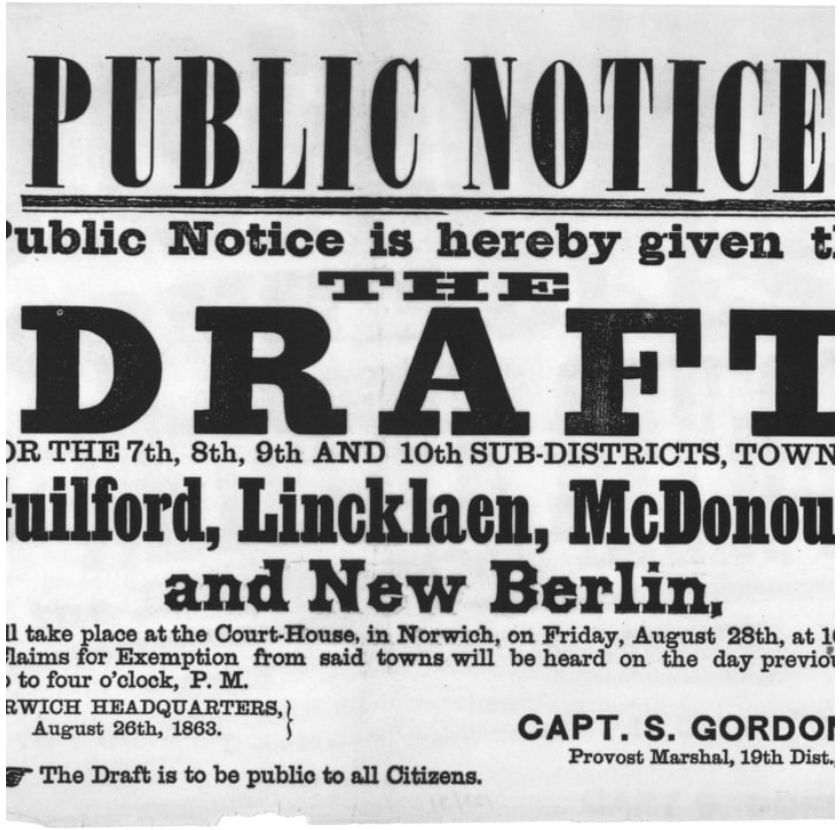
- "…we have to… defend against each one of these manner and means…" Not fair; see *Ross*.

Williams v. State, 2024 Tex. Crim. App. LEXIS 3

Is there such thing as too much notice?

CCA

- Appellant did not timely raise a separate-offense issue to the trial court. It was forfeited.
- *Ross* stems from this court's opinion in *Ferguson*.
- At most it would require the State allege more detail in the charging instrument. It would never require the state to abandon a manner and means in the instrument.
- As long as the charging instrument specifies all the manner and means upon which the state is permitted to rely, there is no problem.


PUBLIC NOTICE

ublic Notice is hereby given t

THE

DRAFT

R THE 7th, 8th, 9th AND 10th SUB-DISTRICTS, TOWN

uilford, Lincklaen, McDonou

and New Berlin,

l take place at the Court-House, in Norwich, on Friday, August 28th, at 1

laims for Exemption from said towns will be heard on the day previ

to four o'clock, P. M.

RWICH HEADQUARTERS,
August 26th, 1863.

CAPT. S. GORDO

Provost Marshal, 19th Dist.

The Draft is to be public to all Citizens.

Nicholson v. State, 682 SW.3d 238 (CCA 2024)

- Appellant was convicted of evading arrest after he maneuvered out of the way of an approaching officer.
- "A person commits an offense if he intentionally flees from a person, he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him.“
  - Appellant argued that the statute required the State to prove he knew the arrest was lawful.

CCA

- The statute is susceptible to multiple interpretations but requiring the State to prove that a suspect knew that the seizure of his person is unlawful leads to absurd results.
  - The arrestee may have conflicting motivations to avoid arrest and will often lack a complete understanding of the officer's training, observations, and knowledge of the facts. Lawfulness is a question best left to the court room.

Lewis v. State, 2024 Tex. Crim App. LEXIS 71

- Appellant was convicted retaliation against his mother. Despite being the alleged victim, the mother posted Appellant's bond.
- The COA acquits the Appellant, and he requests a reinstatement of the bond.
- After an unsuccessful motion in the COA, the State moves for a raise of the bond in the CCA.
- CCA: "[T]his Court has the power, once a PDR is pending here, to determine whether the bail on appeal is insufficient in amount."

Becerra v. State, 2024 Tex. Crim App. Lexis 92

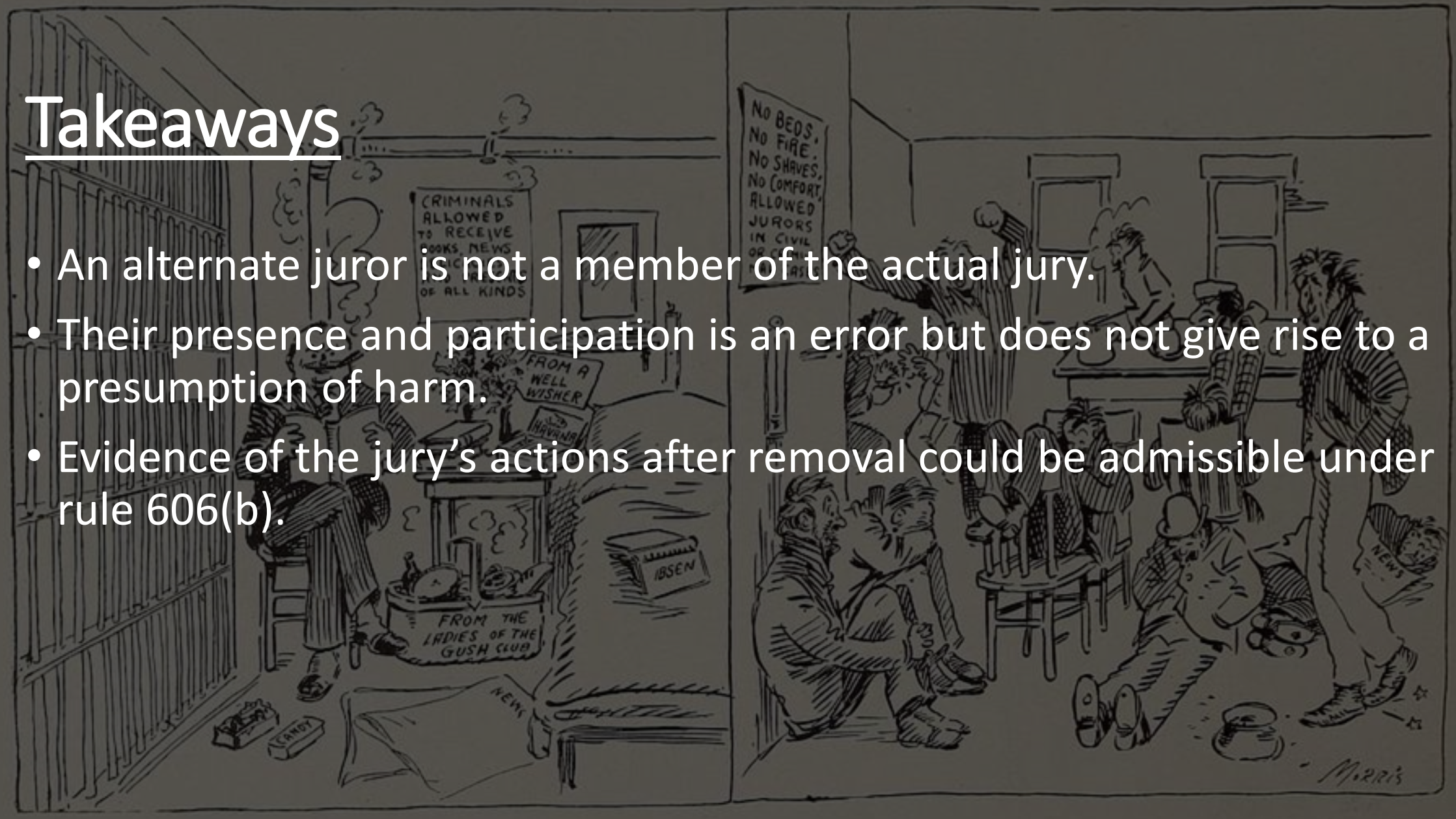
- The TC inadvertently allowed an alternate juror to go back into the jury deliberation room and participate in a vote on the issue of guilt.
- The CCA addressed a variety of statutory and constitutional claims regarding the effect of such an error.

CCA

- Under both the Texas Constitution and the TCCP, alternates are not members of the jury and an individual's right to a twelve-person jury is not violated by their presence. However…
- Juror presence and participation in deliberations is a violation of TCCP 36.22 which prohibits presence during deliberation and communication with jurors about the case.
- Traditionally, a 36.22 violation would trigger a rebuttable presumption of harm, but the Court now rejects this approach in favor of a rule 44.2(b) analysis which does not place a burden on either party. Further, the error itself is not a structural one.
- The inclusion of an affidavit which indicated that a subsequent vote had not been taken once the alternate had been removed was admissible under Rule 606(b)(2) in its entirety. The portion could indicate that the alternate's presence had some effect on the jurors.

Takeaways

- An alternate juror is not a member of the actual jury.
- Their presence and participation is an error but does not give rise to a presumption of harm.
- Evidence of the jury's actions after removal could be admissible under rule 606(b).



The criminal and the jury.

Daniel v. State, 2024 Tex. Crim App. Lexis 109

- Appellant was stopped for failing to maintain a single lane of traffic despite observation that he was not driving unsafely.
- Appellant was charged with a DWI; Appellant moved to suppress the stop.

History of § 545.060(a)

- COAs have historically been divided as to whether the statute sets forth either a single offense or two.
  - “(1) the failure to drive "as nearly as practical" in a single lane *and* (2) unsafe movement when moving from a single lane.”
- CCA: First, a plurality sided with the two-offense interpretation but, later, a majority held that the statute set forth a single offense.

COA

- The COA issued its decision pre-Hardin and deferred to its own precedent finding the law set fourth a single offense. Because Appellant's driving was not unsafe, the stop was unlawful as the officer had witnessed no offense.

- The COA rejected the State's mistake of law argument on the grounds that the absence of binding precedent overruling its prior decision meant that an officer acting within the court's appellate jurisdiction could not have been reasonably mistaken.

Result: The Officer's Mistake was Reasonable

- The statute pre-Hardin posed a very hard/difficult question of statutory construction.
- The 4th Amendment requires objective reasonability not subjective.
- The decision does not encourage forum shopping.

Lall v. State, 2024 Tex. Crim. App. LEXIS 230

- Appellant filed an unsuccessful motion to suppress evidence taken from his vehicle.
- Law enforcement had delayed the stop for the arrival of a canine which revealed the presence of contraband.
- The COA affirmed and relied, in part, on Appellant's refusal to consent to a search.

CCA

- “When the assertion of a Fourth Amendment right gives rise to reasonable suspicion of criminal activity on the part of the people, it is not a right.“
- The COA should have considered facts outside the refusal


Coming
Attractions


10:55 AM
75%
911
mute
keypad
speaker
add call
FaceTime
contacts

State of Texas v. Heath

- A few days before Heath's injury-to-a-child trial, the prosecutor was interviewing a witness **and learned there had been a 911 call**. It had not been mentioned in any police reports.
- The prosecutor retrieved the recording from police and **disclosed it to the defense**.
- During a pretrial hearing, the defense acknowledged there was **no bad faith on the prosecutor's** part and expressed no desire for a continuance, saying he was ready with what he was given and that the **remedy should be the exclusion of evidence**.
- The **trial court agreed**, and the State appealed.

10th COA AFFIRMED

- The court of appeals acknowledged that the previous requirements of "willfulness" or "bad faith" before excluding evidence due to a discovery violation did not apply the same way after the Michael Morton Act.
- But it held that something equivalent had occurred. It noted Tex. Code Crim. Proc. art. 39.14(a)'s requirement that the State provide the listed items "as soon as practicable" suggested a duty on the prosecutor to timely search out discoverable items in the State's constructive possession or control and provide them to the defense.
- It held that waiting until a prosecutor prepares a case for trial is too late and that failing to even ask law enforcement about the existence of discoverable items meets the previous standard of a willful or bad faith violation.
- **Excluding the evidence was thus within the trial court's discretion.**

ISSUES ON PDR

(1) “Has the State’s statutory duty to disclose evidence ‘as soon as practicable’ been violated if the prosecutor fails to disclose an item of evidence the D.A.’s Office **does not know exists** but that has been in police custody for months?”

(2) “If so, **does the trial court have authority to impose an exclusionary sanction** when there has been no bad faith or demonstrable prejudice to the opposing party and the statute provides for no such sanction?”

N.W.A
PARENTAL
ADVISORY
EXPLICIT CONTENT
"STRAIGHT OUTTA COMPTON"

Hart v. State of Texas

- Hart was charged with **capital murder for his role as the getaway driver** in a late-night home invasion murder and robbery.
- Hart's defensive theory was that he lacked the comprehension and communication skills to intentionally assist in the murder and to form intent regarding the plan to break into the victim's home.
- **He testified that he had trouble in school comprehending things** and that, while he agreed to give an acquaintance a ride to his "uncle's" apartment, he knew only of a plan to break into the apartment, not steal anything.
- He testified that he was just being friendly by giving them a ride and never thought it could lead to problems.

Hart v. State of Texas

- **To rebut this theory and prove intent**, the State offered Hart's **Facebook posts quoting rap lyrics and videos of him lip-synching to rap about guns, drugs, dirty money, and jail to demonstrate the fluidity with which he could string thoughts together and to rebut the idea that he was too naïve to have understood what he was agreeing to**.
- Hart's rap name was listed among others in the video's opening credits (although Hart later denied writing the verse that he soloed).
- The trial **court admitted the evidence over Hart's objection that it was not relevant and prejudicial as "an attempt to vilify [Hart's] character for cultural reasons" and based on race**. Hart was convicted and sentenced to life.

5TH COA AFFIRMED

A **divided court of appeals** acknowledged the dissenting justice's concern that **admission of rap lyrics is ordinarily highly prejudicial and of limited relevance**, but that, in this case, the evidence offered **"a small nudge" toward proving a fact of consequence** and that the trial court had **not abused its discretion** in admitting the evidence over a Rule 403 objection.

ISSUE ON PDR

"The Court of Appeals erred in analyzing the harm, bias and prejudice injected into the trial by allowing the introduction of rap videos and Facebook pages."

HART'S ARGUMENT

- Hart argues that the rap evidence has nothing to do with his ability to comprehend and form intent.
- He contends there is a danger of unfair prejudice from this kind of evidence, pointing to research that **jurors sometimes assign a more literal and autobiographical meaning to rap lyrics than similar lyrics from other musical genres and styles**.
- By contrast, Hart offers several examples including the opening verse to "Amazing Grace" that asserts the singer was "a wretch" who "once was lost."
- He suggests a **possible distinction between lyrics reflecting statements of historical fact and inadmissible works of fiction**, with the presumption (when works of art are involved) that any expression is not an assertion of fact (as when Bob Marley recorded that he "shot the sheriff.")
- **He argues that the State used his culture against him** and that judges deciding admissibility questions often apply the standards of an earlier generation, which fails to account for social changes.