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COURT OF CRIMINAL APPEALS
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IN THE COURT OF

CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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JOE LUIS BECERRA

V.

THE STATE OF TEXAS

On Petition for Discretionary Review from the
Tenth Court of Appeals in No. 10-17-00143-CR
affirming the Judgment in
Cause Number 14-03925-CRF-361 from the
361st District Court of Brazos County, Texas

APPELLANT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE[1]

Joe Luis Becerra ("Becerra") was originally charged by indictment with Murder and Manslaughter. A second count of the indictment alleged Becerra was in Possession of a Firearm by a Felon and contained a deadly weapon notice. The indictment was amended by Order signed September 29, 2016. (CR 7).

The State gave a *Brooks* Notice filed September 29, 2016 notifying of their intent to enhance Becerra to habitual offender status (25 years to life) if convicted. (2 RR 8). Appellant chose punishment by the court. (2 RR 6).

On March 6, 2017, a jury was selected and seated. (2 RR). In addition to the twelve jurors, an alternate was selected and seated. (2 RR 138). Before the start of the first phase of trial, the State announced they were not proceeding on the Murder or Manslaughter charges and the jury was sworn. (3 RR 9). Following jury trial on the Possession of a Firearm by Felon charge, Becerra was found guilty, and the jury answered in the affirmative to Special Issue Number One – the deadly weapon finding. (CR 84).

Becerra was assessed fifty-five years in the Texas Department of Criminal Justice. (4 RR 90-91). A Motion for New Trial was filed April 3, 2017, supported by an affidavit signed by a petit juror attesting the alternate juror: 1) participated in

[1] The Clerk's Record is referred to as "CR" and the Reporter's Record as "RR." The first number appearing with the Reporter's Record is volume, with the numbers following page numbers. Defense exhibits at Motion for New Trial stage are referred to as "DX [MNT]" followed by the exhibit number.

deliberations; 2) voted on the guilty verdict rendered; and 3) that no revote was taken after the alternate was separated and the petit jurors were instructed by the Trial Judge. (CR 25). Following a hearing, the Motion for New Trial was denied April 27, 2017. (5 RR 26-27). Notice of Appeal was filed the same day. (CR 194).

In a published Opinion, the Tenth Court of Appeals affirmed Becerra's conviction. *Becerra v. State*, __ S.W.3d __, No. 10-17-00143, 2019 W.L. 2479957 (Tex. App. – Waco June 12, 2019) (*Becerra I*). Becerra filed a Motion for Rehearing on June 20, 2019. The Motion was denied by the Court on July 5, 2019.

Becerra filed his Petition for Discretionary Review in the Court of Criminal Appeals on August 5, 2019. The State filed their Reply to Appellant's Petition on September 4, 2019. Becerra filed a Response to the State's Reply to Petition for Discretionary Review on September 9, 2019. On November 20, 2019, the Court granted Becerra's Petition and ordered briefing in the case but denied his request for oral argument. Becerra filed his Brief on the Merits on December 23, 2019. The State filed their Brief on the Merits on February 11, 2020. Appellant filed a Reply Brief to the State's Brief on the Merits on March 3, 2020.

In a published Opinion dated April 14, 2021, this Court reversed and remanded the case to the Tenth Court of Appeals to reach the merits of Becerra's complaints. *Becerra v. State*, 620 S.W.3d 745 (Tex. Crim. App. 2021) (*Becerra II*). Becerra filed a Brief on Remand on June 11, 2021. The State filed their Brief on Remand on August 11, 2021. Becerra filed a Reply to State's Brief on Remand on September 14, 2021. The

case was set for submission on oral argument by the Tenth Court of Appeals on October 20, 2021.

In an unpublished Memorandum Opinion dated April 20, 2022, the Court again affirmed the Trial Court Judgment. *Becerra v. State*, No. 10-17-00143, 2022 W.L. 1177391 (Tex. App. – Waco April 20, 2022, pet. granted) (not designated for publication) (*Becerra III*). Becerra filed a Motion for Rehearing on May 2, 2022. On May 3, 2022, the Tenth Court of Appeals denied Becerra's Motion for Rehearing.

Becerra filed a Petition for Discretionary Review on June 6, 2022. The State filed a Reply to Becerra's Petition for Discretionary Review on June 14, 2022. Becerra filed a Response to State's Reply to Petition for Discretionary Review on June 21, 2022. On July 27, 2022, this Court granted Becerra's Petition for Discretionary review and ordered merit briefing on the case.

STATEMENT REGARDING ORAL ARGUMENT

This Court denied oral argument when granting Petition for Discretionary Review.

GROUNDS FOR REVIEW GRANTED

Ground for Review One

Art. 36.22 of the Texas Code of Criminal Procedure provides no person shall be permitted to be with a jury while it is deliberating. The petit juror affidavit admitted in Becerra's Motion for New Trial hearing established the alternate juror was present and participated in deliberations and voted on the verdict. Does Art. 33.011(b) governing alternate juror service confer any status permitting the presence and/or participation of the alternate during petit jury deliberations and did the alternate's act in voting violate Art. 36.22?

Ground for Review Two

Rule 606(b) of the Texas Rules of Evidence prohibits evidence of "incidents that occurred during the jury's deliberations." The uncontroverted petit juror affidavit admitted at Becerra's Motion for New Trial hearing attested the alternate juror voted on the verdict and after removal and instruction, no further vote was taken. Is the evidence that no further vote was taken an "incident that occurred during the jury's deliberations" under Rule 606(b) and, if excludable, must Rule 606(b) yield to the need to prove a violation of Art. V, Sec. 13 of the Texas Constitution and Art. 33.01 of the Texas Code of Criminal Procedure?

Ground for Review Three

This Court has long held a rebuttable presumption of harm exists if a facial violation of Art. 36.22 of the Texas Code of Criminal Procedure is shown. The Court of Appeals acknowledged Becerra's admitted evidence that the alternate juror voted on the verdict was admissible as outside evidence under Rule 606(b)(2)(A) of the Texas Rules of Evidence. Did the failure of that Court to apply the presumption based on this evidence so far deviate from accepted law so as to call for the exercise of this Court's jurisdiction?

STATEMENT OF FACTS

Except where necessary for context, this Statement of Facts will focus on the merit issues on the Grounds for Review granted in this case.

1. The evidentiary record from trial prior to verdict

The jury was selected, seated, and sworn on March 6, 2017, by the elected judge of the 361st District Court, Steve Smith ("Presiding Judge"). (2 RR 1). Judge Smith did not mention to the venire during his pre-jury selection remarks that thirteen jurors, twelve petit and one alternate, would be selected and seated. (2 RR 8-17).

Counsel for the State and Becerra did not discuss with the jury panel during general jury selection that an alternate juror would be selected. (2 RR 8-136). Trial Counsel did speak to panel members about their familiarity with the judge who was to preside over the trial, Senior District Judge J.D. Langley ("visiting Judge") (2 RR 119, 120). Following the seating of the jury, Judge Smith advised the jury that Judge Langley would preside the following day. (2 RR 140). Judge Smith's remarks to the seated jury did not mention twelve petit and one alternate were seated, (2 RR 139-141), but he told the seated jury in connection with the Texas Uniform Jury Handbook that "There are notebooks in [jury room] numbered one through 13." (2 RR 139).

The following morning, March 7, 2017, visiting Senior Judge Langley stated he was not familiar with the facts of the case (TRIAL COUNSEL: "[I] guess the Court's not aware of any of the facts of the case? [TRIAL COURT]: I am not."). (3 RR 8).

Following rulings on preliminary issues the visiting Judge explained he would be sitting by assignment for the remainder of the case. (3 RR 36-37). The Trial Court did not mention the alternate juror's selection and presence on the jury before swearing. (3 RR 37-38). Judges Smith and Langley spoke about the seated jury at some point after jury selection because the visiting Judge told the seated jury, "Judge Smith told me that he did not swear you in." (3 RR 38).

The evidentiary record is then silent regarding the constituted jury until the Trial Court excused the jury to begin deliberations. (4 RR 34). Thereafter, the Trial Court, the alternate juror and Court Bailiff appear of record. Neither the State nor Trial Counsel were present. The alternate juror was identified by name in the colloquy. (4 RR 35). The Trial Court gave the time, 10:31 A.M., stated for the record that the alternate was in the jury room from 9:45 A.M. until 10:31 A.M., (Id.), and was then separated from the deliberating jury. The Trial Court stated, "There was no return of verdict at this point." (Id.).

Counsel for the State and Becerra were then summoned to the courtroom. There is no time designation in the Reporter's Record on the length of interruption. The discussion included Becerra's Trial Counsel, Trial Counsel for the State, the Chief of the appellate section of the Brazos County District Attorney's office, (4 RR 36), and belatedly, Becerra. (4 RR 35).

An extended discussion of *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010) (*Trinidad II*) ensued. The Trial Court begins the discussion on *Trinidad II* by stating:

> [TRIAL COURT]: Trinidad versus State looks like it's the most recent. Appeals court erred in reaching the merits of defendant's claim that the presence of alternate juror during deliberations violated 36.22 where defendant's forfeited claims on appeal by failing to object to that trial court's attempt to comply with the amendment of Article 33.011(b) and ran afoul of Article 36.22.
>
> I don't know what that means. Let's see what it means.

(Id.).

This Trial Court's recitation of *Trinidad II* prompted Becerra's Trial Counsel to ask the Trial Court if "it has to be preserved by a motion on my part?" (Id.). This question was left unanswered when the Trial Court began to discuss a jury note asking about the deadly weapon special issue. (4 RR 36-37; CR 187).

During the discussion on *Trinidad II*, the prosecutor, with the Brazos County District Attorney Appellate Chief apparently present, advised the Trial Court: "[b]ring [the petit jury] out [and] instruct them only 12 are supposed to be deliberating. You are not to consider anything your heard from the alternate juror who is no longer part of the deliberations [and] you're instructed that you have received all of the arguments of counsel and basically start over without giving any consideration to what the juror said." (4 RR 37).

The visiting Trial Judge, by then having read Article 33.011(b), realized the ambiguity of the 2007 amendments to the statute saying "Unfortunately, the amended statute does not indicate whether the alternate juror should be allowed to be present for and to participate in the jury's deliberations." (4 RR 38).

The visiting Trial Judge drafted a proposed instruction. The instruction drafted by the Trial Court and later read to the petit jury and the alternate juror, who was in the jury box, read as follows:

> [TRIAL COURT]: Members of the jury, jury deliberations began at 9:45 a.m. At 10:31 a.m., the Court realized that the alternate juror, [alternate juror], was allowed into the jury room by mistake and [alternate juror] was at that time asked to separate from the jury. [Alternate juror] has been placed in a separate room over here and he will continue to serve as the alternate juror in this case. He simply cannot be present during the deliberations of the 12 jurors.
>
> You are to disregard any participation during your deliberations of the alternate juror, [alternate juror]. And following an instruction on this extra note that the Court received, you should simply resume your deliberations without [alternate juror] being present.
>
> Now, at 10:45 a.m., the Court received the following note from the jury room - it's signed by [foreperson]. We would like clarification on issue No. 1. In response to that note the Court does not understand what your concerns are and the issue that you're raising is not clear enough for me to be able to give you any further instruction or evidence on the matter about which you have inquired. You are free to clarify that in writing, signed by the presiding juror after you have resumed your deliberations.
>
> Without further instruction the jury minus [alternate] juror is instructed to resume your deliberations.
>
> [Alternate juror], if you could, just return back to the side room over here.

Thank you very much and the jury may resume your deliberations.

(4 RR 41 [presented to counsel for Mistrial Motion], 43-44 [read to jury]).

The instruction did not include the suggested language, referenced above, that the petit jury to begin deliberations anew without the alternate present. (4 RR 37). The instruction also referenced the second jury not received at 10:45 A.M. on the special issue appearing after the jury verdict form. (CR 185-86).

Before reading the instruction to the petit jury and the alternate, the Trial Court presented it to Trial Counsel:

> [TRIAL COURT]: Well, do you have any problem with that, [Trial Counsel]?
>
> [TRIAL COUNSEL]: Not with the instruction, Your Honor, but I think I'm compelled to ask for a mistrial based on the presence of the juror, preserving any error, if any.
>
> [TRIAL COURT]: I understand. In making that objection, do you have any indication of harm at this point?
>
> [TRIAL COUNSEL]: No, sir, I don't at this point.
>
> [TRIAL COURT]: All right. At this juncture, then, your objection will be overruled, but I won't bar you from re-urging it at a later point.

(4 RR 44).

Following the reading of the instruction, the parties and Trial Judge, all seasoned and experienced attorneys, commented on the unusual turn of events. The visiting Trial Judge remarked, "As long as I do this I still see new stuff all the time. This is just one of those things." (4 RR 44).

There is no record on the length of deliberation after the instruction was read. The jury returned a verdict of "Guilty" on the charged offense and "True" on the Special Issue submission. (4 RR 46). The twelve petit jurors were polled at the request of Trial Counsel, each affirming it was their verdict. (4 RR 46-48).

2. Post-trial proceedings in the Trial Court

Becerra filed a timely Motion for New Trial on April 3, 2017. (CR 25). The Motion alleged violations of Article V, Section 13 of the Texas Constitution and Articles 33.01, 33.011 and 36.22 of the Texas Code of Criminal Procedure regarding the alternate juror deliberating and voting on the verdict actually received by the Court. (Id.).

Ten exhibit attachments supported the grounds asserted in the Motion. (Id.). Included, in addition to the much-discussed petit juror affidavit, (DX 1 [MNT]; CR 42-44), was the seated jury list. (CR 75). The jury list names the alternate juror as well as petit juror who signed the affidavit attached to the Motion for New Trial. (Id.). The affidavit of Becerra's Trial Counsel was also attached, (CR 46-48), attesting that he did not know whether the alternate was present and voted on the verdict of guilt. (CR 47 [last paragraph]). Becerra's Motion for New Trial urged all complaints, except the need for affirmative waiver under *Marin*, that were later urged in the Court of Appeals. (CR 26 [Art. V, Sec. 13]; CR 31 [Art. 33.01, 33.011, 36.22]).

A hearing on the Motion was held on April 27, 2017. The Presiding Judge, who had presided over jury selection, but not trial, heard evidence on the Motion. (5 RR 1).

All evidence attached to Becerra's Motion was offered and admitted were unobjected to except the petit juror affidavit. (5 RR 6-8).

The primary evidentiary dispute at the hearing on the Motion was the admissibility of the petit juror affidavit. (DX 1 [MNT]; CR 42-44). The State objected to the admissibility of the juror affidavit solely under Rule 606(b) of the Texas Rules of Evidence.

Becerra argued the petit juror affidavit was evidence of outside influence meeting the exception of Rule 606(b)(2)(A). (5 RR 8-9). Becerra argued the affidavit was admissible because the petit juror affidavit did not disclose specific statements part of the deliberative process, but only that the alternate had engaged in deliberations. (5 RR 9-10). Additionally, Becerra argued as to the Constitutional ground that Rule 606(b)(1) could not exclude evidence of the vote by the alternate on the verdict when *Trinidad II* held this to be the essence of the Constitutional violation. (5 RR 1-11).

The Trial Court focused on footnote twenty-four of *Trinidad II* in making the evidentiary call on the petit juror affidavit. (5 RR 11). That footnote reads:

> [Whether] the alternate jurors constituted outside 'persons' in contemplation of Article 36.22 depends, at least in part, upon the Legislature's intention when it amended Article 33.011(b). The State argued on appeal that Article 36.22 was not violated because amended Article 33.011(b) renders an alternate juror a part of the regular 'jury' during its deliberations, so that the alternate juror would not constitute an outside 'person' in contemplation of Article 36.22's prohibition. The court of appeals found the text of Article 33.011 to be ambiguous, however, with respect to this question. *Trinidad* [I] supra, at 59; *Adams*, supra, at 66–

> 67. Resorting, therefore, to legislative history, the court of appeals determined that the Legislature did not intend that alternate jurors should actually participate in jury deliberations prior to any disability of a regular juror, but should instead be separated until such time as they might be needed. Id. Given our ultimate holding, infra, that the appellants forfeited their statutory claims, we leave resolution of this issue for another day.

Trinidad II, fn. 24.

> The issue was extensively argued at the hearing:
>
> [STATE'S ATTORNEY]: [But] I go back to the court of criminal appeal's *Trinidad* [II] opinion to the following and that is this, that the alternate jurors were present in the jury room during deliberations and may have even participated in all but the voting does not mean that the jury was composed of more than 12 members for purposes of Article 5, Section 1[3].
>
> I believe that means that the court of criminal appeals has found -- plus with the reading of 33.011(b) that the presiding juror -- or alternate juror, excuse me, can be in the room. There's no violation for them being in the room. And so if there's no violation for them to be in the room, then how can they be an outside influence?
>
> [APPELLATE COUNSEL]: Judge, may I respond very briefly?
>
> [TRIAL COURT]: You may.
>
> [APPELLATE COUNSEL]: The -- Footnote 24 that the Court is citing to, the last sentence specifically references that given our ultimate holding here that [appellant] forfeited their statutory claims, we leave resolution for another day.
>
> [TRIAL COURT]: For another day.
>
> [APPELLATE COUNSEL]: Yes, sir. So, you know, we're –
>
> [TRIAL COURT]: So you're trying to tell me that this is the other day?
>
> [APPELLATE COUNSEL]: That's exactly what I'm telling you. We are here in -- and *Trinidad* again, says -- I don't have any argument with what

> [State's Attorney] just said related to participation, but it specifically says if the juror votes, okay, that's a constitutional violation. Now, harm's a different issue, but what we're talking about here is not necessarily the merits. What we're talking about is the admissibility of the evidence that would prove up the fact that the alternate did vote as part of the verdict rendered in the case.
>
> [TRIAL COURT]: All right. My ruling is going to be that I do believe that it could constitute an outside influence. I'm simply overruling [the State's] objection to the affidavit. That's the only thing I'm doing. It [Defendant's Exhibit 1] will be admitted.

(5 RR 12-13).

The Trial Court, after hearing the arguments concerning the merits of the grounds asserted in Becerra's Motion for New Trial, denied the Motion. In denying the Motion, the Trial Court also focused on the importance of the admission of the petit juror affidavit on preservation of error:

> [TRIAL COURT]: If the ruling [admitting the juror affidavit] on 606(b) is incorrect, then clearly you [Appellant] have no evidence to support your motion. And I note that for the appellate court because I feel that possibly this is one of those cases where subsection b does apply and there is an outside influence.

(5 RR 25).

Further recitation is deferred to the Grounds for Review as argued below.

SUMMARY OF THE ARGUMENT

The 2007 amendments to Article 33.011(b) changing discharge of alternate jurors to when the jury is discharged after first or second phases of trial has wrecked its own kind of havoc on trial courts. This case presents a record that allows this Court to use construction canon and aids contained in the Code Construction Act on the ambiguous text of the amended statue. These tools favor a construction that alternate jurors are not allowed to be present and deliberate with regular jurors.

The evidentiary record from Becerra's trial and Motion for New Trial established the alternate juror participated in deliberations, voted on the verdict, and that no revote was made after the alternate was removed. This deliberation and vote took place over forty-six minutes on trial evidence lasting a day – significantly longer, and with a vote on that deliberation – than any reported case.

Harm occasioned by the violations of Article V, Section 13 of the Texas Constitution and Articles 33.01(a) and both sentences of Article 36.22 was not cured by the defective instruction after the alternate was removed or the post-verdict jury poll. The instruction affirmatively told the jury to resume deliberations on a verdict Becerra's Motion for New Trial demonstrated had ended. The post-verdict jury poll could not reveal that the verdict was a product of more than their number.

On this record unanimity of the vote to convict does not define harm. Instead, it is the alternate's voice in deliberation on that vote of a number other than required by the Texas Constitution and statute that define harm analysis.

ARGUMENT

GROUND FOR REVIEW ONE

Art. 36.22 of the Texas Code of Criminal Procedure provides no person shall be permitted to be with a jury while it is deliberating. The petit juror affidavit admitted in Becerra's Motion for New Trial hearing established the alternate juror was present and participated in deliberations and voted on the verdict. Does Art. 33.011(b) governing alternate juror service confer any status permitting the presence and/or participation of the alternate during petit jury deliberations and did the alternate's act in voting violate Art. 36.22?

GROUND FOR REVIEW THREE

This Court has long held a rebuttable presumption of harm exists if a facial violation of Art. 36.22 of the Texas Code of Criminal Procedure is shown. The Court of Appeals acknowledged Becerra's admitted evidence that the alternate juror voted on the verdict was admissible as outside evidence under Rule 606(b)(2)(A) of the Texas Rules of Evidence. Did the failure of that Court to apply the presumption based on this evidence so far deviate from accepted law so as to call for the exercise of this Court's jurisdiction?

(Argued together)

A. Article 33.011(b) of the Texas Code of Criminal Procedure is ambiguous and resort to extra-textual sources is necessary

Legislative intent is best derived from the plain text of the statute. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). A reviewing Court goes behind the statutory text if the statute is ambiguous or if the application of the statute's plain language would lead to an absurd result that the legislature could not possibly have intended. *Id.* The plain language of Article 33.011(b) is unambiguous that an alternate juror should not be dismissed until after the jury has rendered a verdict and punishment has been assessed. TEX. CODE CRIM. PRO. ART. 33.011(b). However, the

statute fails to address the role of the alternate during deliberations and whether the alternate should participate in the jury's deliberations.

This statutory ambiguity was first recognized by this Court in *Trinidad v. State*, "Unfortunately, the amended statute [Article 33.011(b)] does not indicate whether the alternate juror should be allowed to be present for, and to participate in the jury's deliberation or, instead whether [they] should be sequestered from the regular jury during its deliberations until such time as the alternate's services might be required by disability of a regular juror." 312 S.W.3d 23, 24 (Tex. Crim. App. 2010) (*Trinidad II*).

In her *Trinidad* concurrence, Judge Cheryl Johnson requested legislative clarification of the ambiguity. *Id.* ("In any event we are left to discern, if we can, what the legislature intended [status of alternate jurors after deliberations begin]. More concise language about what to do the retained alternate juror would be most helpful."). *Id.* at 30. The legislature has not revisited the ambiguity in the fifteen years since the amendment was passed.

The ambiguity as to the role of the alternate juror after deliberations begin has been recognized by the Austin Court of Appeals in an opinion authored by the late Court of Criminal Appeals Judge John Onion. *See, e.g., Castillo v. State,* 319 S.W.3d 966, 969 (Tex. App. – Austin 2010, pet. ref'd) ("The statute does not address what trial courts should do with the alternate juror during deliberations but prior to the jury rendering the verdict."). The visiting Judge in this case also recognized the ambiguity. (4 RR 38). ("Unfortunately, the amended statute [Art. 33.011(b)] does not indicate

whether the alternate juror should be allowed to be present for and to participate in the jury's deliberations.").

The Code Construction Act statutory construction canon and amendments legislative history support Becerra's construction that alternate jurors have different service than regular jurors once the jury retires to deliberate and vote on a verdict. TEX. GOV'T CODE Ch. 311.

B. Statutory canon as codified in the Code Construction Act favor construction of Article 33.011(b) that does not permit the presence or deliberation by alternate jurors unless disability occurs to a regular juror

Articles 33.01 and 33.011(b) of the Texas Code of Criminal Procedure read as follows:

> Art. 33.01. JURY SIZE.
>
> (a) Except as provided by Subsection (b), in the district court, *the jury* shall consist of twelve qualified *jurors*. In the county court and inferior courts, *the jury* shall consist of six qualified *jurors*.
>
> (b) In a trial involving a misdemeanor offense, a district court jury shall consist of six qualified *jurors*.
>
> Art. 33.011. ALTERNATE JURORS.
>
> (b) *Alternate jurors* in the order in which they are called shall replace *jurors* who, prior to the time *the jury* renders a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment, become or are found to be unable or disqualified to perform their duties or are found by the court on agreement of the parties to have good cause for not performing their duties. *Alternate jurors* shall be drawn and selected in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, security, and privileges as *regular jurors*. An *alternate juror* who does not replace a *regular juror* shall be

> discharged after *the jury* has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment.
>
> Art. 36.22 CONVERSING WITH THE JURY
>
> No person shall be permitted to be with *a jury* while it is deliberating. No person shall be permitted to converse with *a juror* about the case on trial except in the presence and by the permission of the court.

TEX. CODE CRIM. PRO. ARTS. 33.01, 33.011(b) and 36.22 (emphasis added).

"[Statutes] *in pari materia* are to be taken, read, and construed together, and effort should be made to harmonize, if possible, so that they can stand together and have concurrent efficacy." *Davis v. State,* 968 S.W.2d 368, 372 (Tex. Crim. App. 1998) (citing *Brown v. State*, 716 S.W.2d 939, 949 (Tex. Crim. App. 1986)). In *Brown v. State*, this Court relied on this statutory construction canon to harmonize Articles 37.07 and 42.12 of the Texas Code of Criminal Procedure on the admissibility at punishment stage of an order for deferred adjudication of guilt. *Id.* The statutes were *in pari materia* because both related to the admissibility of evidence at the penalty stage of a bifurcated trial. 716 S.W.2d at 950.

In *Trinidad II* this Court held a violation of Article V, Section 13 of the Texas Constitution is not triggered by presence of the alternate and deliberation with a petit jury. *Trinidad II* at 28. ("That the alternate jurors were present in the jury rooms during deliberations and may even have participated in all but the voting, does not mean that the jury was 'composed' of more than twelve members for purposes of Article V, Section 13."). In a footnote the Court read Article 33.01 the same manner. ("Article

33.01(a) was not violated any more than Article V, Section 13 was. Because only twelve regular jurors ultimately voted on [defendants] verdict, their juries did 'consist' of twelve jurors for purposes of the statute.") *Id.* at fn. 22.

The *Trinidad II* Court reserved the question of whether an alternate juror constituted an outside person under Article 36.22, writing that resolution of that issue of statutory construction was left "for another day." *Id.* at 28, fn. 24. The Trial Court in this case recognized Becerra's Motion for New Trial raised the issue. ([TRIAL COURT]: "So you're trying to tell me that this is the other day?") (5 RR 12-13).

The first sentence of Article 33.011(b) contrasts alternate juror service from regular juror service. TEX. CODE CRIM. PRO. ART. 33.011(b). ("Alternate jurors in the order in which they are called replace jurors who, prior to the time the jury renders a verdict…"). It is statutory construction canon that the legislature intended the entire statute to be effective. TEX. GOV'T CODE § 311.01(2). This rule of statutory construction goes hand in hand with the plain meaning rule. *Morter v. State,* 551 S.W.2d 715, 718 (Tex. Crim. App. 1977). The best evidence of what the legislature meant in the statute are the words the legislature chose and each must be given effect. No interpretation should render part of the statute meaningless or ineffective. *Childress v. State*, 784 S.W.2d 361, 364 (Tex. Crim. App. 1990).

The 2007 House Bill amended both Article 33.011(b) and 36.29(d), related to juror disability. Review of the changes support Becerra's construction. The amendment deleted language discharging alternates from service when the "the jury

retires to consider its verdict" and changing alternate service discharge to after "the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment." House Research Org. Bill Analysis, Tex. H.B. 1086, 80th Leg., R.S. (2007) (Appendix Two). The legislation also amended Article 36.29 with similar language. *Id.*

The 2007 amendment was in service of reducing mistrials resulting from regular juror disability. House Research Org. Bill Analysis, Tex. H.B. 1086, 80th Leg., R.S. (2007) (Appendix One). The legislation did not alter the existing language in the first sentence of Article 33.011(b) conditioning and distinguishing alternate service from juror service on the jury, "*Alternate jurors* in the order in which they are called shall replace *jurors* who, prior to the time *the jury* [renders a verdict.]" TEX. CODE CRIM. PRO. ART. 33.011(b) (emphasis added). Article 36.22's first sentence is specific to jury deliberations. Article 36.22's first sentence recognizes the elevated importance of the deliberative process and integrity. The statute uses the term "a jury" in proscribing the presence of any other persons during deliberations.

Reading Articles 33.01, 33.011(b), 36.22 and 36.29 *in pari materia*, the size of the deliberating and voting jury present in the jury room is fixed and defined as twelve persons. The presence another person – including alternates – adding to that fixed number is prohibited unless regular juror disability is triggered. This construction recognizes petit and alternate jurors are equal stakeholders in the qualification and assimilation of trial evidence but not in service of deliberation and vote. Article

36.22's two sentences acknowledge the difference between the jury as a collective deliberating body and the individual jurors making up that collective body. Article V, Section 13 of the Texas Constitution and Article 33.01(a) applies to a number other than the mandated twelve voting on the verdict. *Trinidad II* at 27. Article 33.01 defines "the jury" as "twelve qualified jurors."

C. A construction of Article 33.011(b) allowing alternates in the jury room cannot be limited to presence alone under Article 36.22

Alternative construction of Article 33.011(b) cannot limit alternate participation in the jury room to presence. This construction results from the wording of Article 36.22. If alternates are members of the composed jury under Articles 33.01 and 33.011(b), nothing in Article 36.22 limits alternate juror to presence.[2] This was the construction argued by the State at Motion for New Trial. (5 RR 13).

This construction arguably runs afoul of construction canon codified in Article 311.021(1) of the Code Construction Code that in enacting a statute it is presumed the legislature intended compliance with the Texas and Untied States Constitutions. TEX. GOV'T CODE § 311.021(1). A construction of Article 33.011(b) resulting in alternates and regular jurors having equal stake in voice but not equal stake in vote poses facial

[2] For example, defense counsel believes favorable district court alternate jurors – as many as four – are in the jury box during trial. TEX. CRIM. PRO. ART. 33.001(a). The trial judge gives an instruction prior to the jury retiring that the alternates can be present but not deliberate. Defense counsel objects arguing, correctly, that nothing in Article 36.22 restricts alternate jurors to presence alone. *E.g., Laws v. State*, infra; *Gonzalez v. State,* infra. (alternates present in jury room but instructed not to deliberate).

due process issues – a deliberating alternate does not own the verdict the way a deliberating and voting regular juror must.

Policy considerations are plentiful to permit alternate jurors to be present but not deliberate in the jury room. Judges, prosecutors, and criminal defense trial lawyers can recite any number of reasons this approach is preferable. For example, Texas allows jury assessment of punishment by jury. The 2007 amendment to Article 33.011(b) requires alternates not be discharged, if the jury assesses punishment, until after punishment. TEX. CODE CRIM. PRO. ART. 33.011(b).

Allowing alternates to be present, but not deliberate, during the first phase of trial has benefits if alternate substitution becomes necessary during the punishment phase of trial. Substituting an alternate during punishment phase deliberations raises its own Constitutional issues. *See, e.g., Gonzalez v. State*, 616 S.W.3d 585, 592-93 (Tex. Crim. App. 2020) (attempting to raise a Sixth Amendment claim). Nevertheless, an alternate not present during deliberation in first phase trial proceedings has the benefit of hearing the same trial evidence as the regular jurors who deliberated on the first phase verdict. More fundamentally, these various policy considerations are the responsibility of the legislature rather than the judiciary.

The plain text of Article 36.22 does not limit juror participation to presence. This means as many as four alternates, a full one-third of regular jurors, would be authorized in District Courts to be present and deliberate but not vote on a verdict. This poses its own potential State and Federal Constitutional issues.

Becerra's construction squares Article 33.011(b) and 36.22's use of the words alternate juror, regular juror, and juror – individuals with identical rights but separate service – with the words "the jury" (Article 33.011(b)) and "a jury" (Article 36.22). In both statutes the individual juror is different in meaning than when used in service of the collective deliberating body – the jury – that is sequestered from outside influence.

In this way, Becerra's construction also harmonizes Article 33.011(b) with deliberating jury sequestration in Article 35.23. TEX. CODE CRIM. PRO. ART. 35.23. Article 35.23 provides a court may sequester "the jury" until a verdict has been rendered or the jury is discharged. *Id.* Becerra's construction would not necessarily require the alternate to be sequestered separate from the deliberating jury until a verdict is reached. Instead, the alternate in a trial court's discretion could be released with appropriate instructions subject to recall, until disability to one of the regular jurors triggers their service.

Becerra's construction is consistent with *Trinidad II*'s holding that Article 33.01(a)'s definition of the jury applies to voting only. Article 36.22 distinguishes between presence of outside persons with *a jury* when deliberating from outside communications with *a juror* about the case on trial. Becerra's construction harmonizes Article 36.22 with the differences in alternate and regular jury service as contained in Article 33.011(b) while honoring their identical rights and qualifications as jurors unchanged by the 2007 amendments.

D. Statutory construction as codified in the Code Construction Act favors a construction of Article 33.011(b) that does not permit the presence of and deliberation by alternate jurors unless disability to a regular juror requires service

In *Trinidad v. State*, 275 S.W.3d 52 (Tex. App. – San Antonio 2008), *reversed on other grounds*, 312 S.W.3d 23 (Tex. Crim. App. 2010)) (*Trinidad I*) the San Antonio Court of Appeals erroneously found Article V, Section 13 was *Marin* affirmative waiver-only error. *Trinidad I* at 57-58. Although this Court on Petition for Discretionary Review found *Marin* affirmative waiver inapplicable to statutory claims in that case, *Trinidad II* at 29, the Court of Appeals analysis on the 2007 amendments to Article 33.011(b) is informative on this evidentiary record.

The Court of Appeals considered the bill analysis from the House version of the amendment to Article 33.011(b) that explained the change was needed to prevent mistrials occurring when a juror becomes disqualified after the jury has begun its deliberations. *Id.* at 59 (citing House Research Org. Bill Analysis, Tex. H.B. 1086, 80th Leg., R.S. (2007)). In a footnote, the San Antonio Court of Appeals explained that prior to the amendment the alternate was dismissed prior to deliberations and in the event of a petit juror being dismissed, and absent agreement to deliberate with eleven, a mistrial would be declared. *Trinidad I* at 59, fn. 3.

The Court of Appeals in *Trinidad I* found more significant the House floor debates on the bill during questions concerning whether the "intent was the alternate

who did not replace a regular juror refrain from participating in any juror deliberations in the case." *Id.* The response:

> Yes, sir. As you know, only the 12 jurors who are seated as regular jurors may participate in any jury deliberations. My intent is for alternate jurors who do not replace a regular juror to not participate in any deliberations—whether that be guilt or innocence or punishment—and that the court would direct the alternate jurors to be separated from the regular jurors and to refrain from deliberating or discussing the case unless they are seated as a regular juror.

Id. (quoting Texas House Journal, Tex. H.B. 1086, 80th Leg., R.S., 83rd Leg. Day (2007)).

A construction of these statutes reading Article 33.011(b) in a way making alternates part of the jury for purposes of that statute but not a member of the jury in Article 33.01 creates different meanings for the same phrase in statutes that follow one another on the same topic. Harmonizing Article 36.22 with these two statutes then becomes impossible.

E. Article 36.22 of the Code of Criminal Procedure was violated by the alternate juror's presence, participation, and vote during deliberations

Article 36.22 is meant to prevent an outsider from contaminating jury deliberation and influencing vote and verdict. *See, Chambliss v. State*, 647 S.W.2d 257, 266 (Tex. Crim. App. 1983). ("As we read Article 36.22 [its] main purpose is to prevent an outsider from saying anything that might influence a juror.").

Cases presented since the 2007 amendment to Article 33.011(b) have included trial courts instructing alternates to be present and deliberate with the petit jury, but

not vote on the verdict. *See, e.g., Trinidad II* at 25; *Adams v. State*, 312 S.W.3d 23, 25 (Tex. Crim. App. 2010) [consolidated with *Trinidad II*]. Alternates have also been allowed to retire with the petit jury and instructed to not participate in deliberations and voting. *See, e.g., Laws v. State,* 640 S.W.3d 227, 229 (Tex. Crim. App. 2022).

The trial court's instruction in *Laws* instructing that the alternate's presence without deliberation does not square with any viable construction of the plain language used in Articles 33.01, 33.011(b) and 36.22. Either the alternate is a member of the jury and exempt from the prohibitions of Article 36.22 or is not a member of the jury under those statutes and their presence barred.

Yet another variant of alternate juror service, deliberation, and Article 36.22 has been the jury being provided no instruction before deliberations begin. In this variant the petit jurors and the alternate retire together. The alternate is later removed from the jury room and the petit jury given a curative instruction. *See, e.g., Becerra v. State*, 620 S.W.3d 745, 746-47 (Tex. Crim. App. 2021) (*Becerra II*); *see also, Klapesky v. State*, 256 S.W.3d 442, 451-52 (Tex. App. – Austin 2009, pet. ref'd) (pre-2007 33.011(b) case involving no rebuttable presumption where two alternates in jury room for 5 minutes, deliberations not started, and instruction given)).

In cases involving an alternate deliberating without instruction as to status, jurors, the Court on its own initiative during trial, or the State at Motion for New Trial stage has rebutted presumption of harm. *See, e.g., Bogue v. State*, 204 S.W.3d 828

(Tex. App. – Texarkana 2006, pet. ref'd) (evidence showed deliberation of 5-13 minutes with no vote by alternate); *Rojas v. State*, 171 S.W.3d 442 (Tex. App. – Houston [14th Dist.] 2005, pet. ref'd) (deliberation with alternate for 15 minutes, with no alternate vote and evidence at Motion for New Trial rebutting presumption of harm).

If the alternate is not a member of the jury under Articles 33.01, 33.011(b) and 36.22, then their presence and participation in deliberations and vote with the twelve-person jury is a facial violation of the first sentence of Article 36.22 of the Texas Code of Criminal Procedure. Alternatively, under this record, even if the statutes are construed in a way to permit alternate juror presence during deliberations, voting on the verdict is prohibited.

The evidentiary record in this case establishes the alternate juror participated for forty-six minutes with the petit jury and voted on the verdict. That vote, even under the State's construction of Article 33.011(b), would facially violate Article 33.01 because that statute's mandate the jury be composed of twelve persons was not cured by instruction. The defective curative instruction given by the Trial Court is developed in Ground for Review Two below.

F. Proper harm analysis in this case utilizes the presumption of harm shown by the facial violation of Article 36.22 and unrebutted by the State at Motion for New Trial

1. Harm under Article 36.22 based on the alternate juror's presence during deliberations

This Court may undertake clarification of harm standards and presumption of harm involving the first and second sentences of Article 36.22. In this case, if Article 33.011(b) as construed to not allow alternate juror presence and deliberation, both sentences are applicable and require harm analysis.

In *Laws*, supra, this Court found Article 36.22 error assignment was preserved and remanded the case for a merits decision. *Laws v. State*, 640 S.W.3d at 231. In a footnote this Court cited *Becerra II* writing "*Becerra [II]* involved a potential juror misconduct by an alternate juror during deliberations. *Id.* at fn. 2 (citing *Becerra II*).

On remand, the Texarkana Court of Appeals in *Laws* found the defendant was not harmed by the alternate's presence in the jury room. *Laws v. State*, No. 06-19-00221-CR, 2022 W.L. 2811958 (Tex. App. – Texarkana July 19, 2022, pet. filed August 15, 2022) (not designated for publication). The Texarkana Court of Appeals assumed a violation of Article 36.22's first sentence, citing the Waco Court of Appeals decision in this case below. *Id.* at *5 (citing *Becerra III*). The Texarkana Court of Appeals held the presumption of harm in a violation of Article 36.22's first sentence attached. *Id.* (citing *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009)).

The Texarkana Court of Appeals then cited to an unpublished case and held the presumption of harm attendant to the second sentence of Article 36.22 did not attach because the was no evidence what the communication was about. *Id.* at *6 (citing *Hendrix v. State*, No. 05-18-00822-CR, 2020 W.L. 3424915 at *4 (Tex. App. – Dallas June 23, 2020, no pet.). *Hendrix,* citing *Stults v. State*, 23 S.W.3d 198 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd) held "The defendant's burden is not satisfied if there is no showing what a reported conversation was about." *Hendrix*, 2020 W.L. 3424915 at *4 (citing *Stults* at 207).

The Texarkana Court of Appeals reliance on *Hendrix* and *Stults* on the initial burden in cases involving the second sentence of Article 36.22 misreads *Stults*, at least where, as here, the evidence establishes an alternate participated in deliberation and vote. In *Stults* this Court held "The defendant, however, has the initial burden to show the conversation *was about the case on trial*." *Stults,* 23 S.W.3d at 207 (emphasis added). *Stults* involved a pre-deliberation communication. *Id.*

In this case, even before the extra record evidence from the Motion for New Trial, the alternate fully participated in deliberations for forty-six minutes. By definition this means the alternate conversed with petit jurors about the case on trial. This evidence is augmented by the alternate's vote on the verdict against Becerra. In finding that the defendant in *Laws* was not harmed by the alternate's presence in the jury room, the Texarkana Court of Appeals used the non-constitutional harm standard of Rule 44.2(b) of the Texas Rules of Appellate Procedure. *Laws*, 2022 W.L. 2811958 at *7. After

characterizing the evidence as "strong" the Court of Appeals sifted the trial evidence and found no harm. *Id.* at *7.

In this case, the trial testimony is contained in a single volume, concluded in a day. (3 RR). The first fifty-three pages of the jury trial volume are devoted to arguments on the admissibility of evidence, particularly the admissibility of third-party testimony from an unavailable witness – Mauricio Salazar, also known as "Guicho." (3 RR 1-53). Excluding opening statements, the trial evidence in the first phase consisted of approximately one hundred sixty-six pages.

The first jury note, time noted at 9:55 A.M. on March 8, 2017, imaged in Ground for Review Two below, supports the deliberating body of the petit jury and alternate was focused on the evidence of the unavailable witnesses – Sylvia Ramirez, Becerra's long-time girlfriend (did not testify), "Guicho," (did not testify), and a "tape" from Bryan Police Department Detective Travis Hines. The "tape" was likely was reference to the recorded statement Hines had taken from Sylvia Ramirez that Becerra had asked for a gun at some point. The tape was not played, as Hines testified to its contents as impeachment evidence.

This jury note indicates the jury was focused on the missing evidence. Additionally, the length of the deliberation on guilt was not short given the brevity of the trial evidence. Taken as a whole, and through the prism of what went on in the

jury room – forty-six minutes that the alternate was not just present but deliberating as in *Laws* – Becerra's substantial rights were disregarded.

2. Harm under Article 36.22 based on the alternate juror's communications with regular jurors during deliberations

In relation to Article 36.22's second sentence, in *McQuarrie v. State,* the Court of Criminal Appeals provided the harm standard for claims of admissible outside influence after deliberations begin. 380 S.W.3d 145, 154 (Tex. Crim. App. 2012) (citing *Manley v. AmBase Corp.*, 337 F.3d 237, 252 (2nd Cir. 2003) ("The trial court should first determine the nature of the unauthorized communication, then "[conduct] an objective analysis to determine whether there is a reasonable *possibility* of that [the outside influence] had a prejudicial effect on the 'hypothetical average juror.'"). This harm standard recognizes the due process implications of contamination of deliberation by outside influence. *Id.* 153 (citing *Pyles v. Johnson*, 136 F.3d 986, 992 (5th Cir. 1998)).

The *McQuarrie* standard requires the *possibility* of harm that the outside influence had a prejudicial effect on the hypothetical average juror. The *McQuarrie* standard was announced two years after *Trinidad II*. This Court may wish to harmonize or clarify the *McQuarrie* harm standard with this Court's long-standing legal rule that Article 36.22 claims presume harm when there is evidence it facially violates the statute. *See, e.g., Castillo v. State*, 319 S.W.3d at 973 (state rebutted deliberation claim under Art. 36.22); *Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997) (pre-deliberation Art. 36.22

claim rebutted); *Stults v. State*, supra, at 206-207 (pre-deliberation Art. 36.22 claim did not trigger presumption).

The evidentiary record here evinces harm different in form than traditional outside influence cases. It is also different from a harm showing on cases involving front-end instructions to petit jurors and alternates identifying the alternates and that the alternates were permitted to be present but not deliberate or vote. *See, e.g., Trinidad* supra at 25; *Laws* supra at *2.

Although under Becerra's construction of Article 33.011(b) the front-end instructions given by the trial courts in *Trinidad* and the case it was consolidated with in this Court, *Adams v. State,* 275 S.W.3d 61 (Tex. App. – San Antonio 2008) *reversed* 312 S.W.3d 23, 29-30 (Tex. Crim. App. 2010) would be error, such front-end instructions at least inform jurors of the difference in the rank and responsibility of petit and alternates in the jury room. In such a situation, if error is preserved, any harm showing could potentially be rebutted by the State.

Not so in this case. No reported case has near the length of the alternate presence and participation present in this case – forty-six minutes – or the critical evidence that the alternate juror actually voted on the verdict. *See, e.g., Bogue,* 204 S.W.3d at 829-30 (deliberation of 5-13 minutes with no vote by alternate); *Rojas*, 171 S.W.3d at 449-51 (deliberation with alternate for 15 minutes, no alternate vote or other evidence rebutting presumption). This case has an evidentiary record of unrebutted harm absent in those cases.

In this case, the alternate participated with same voice and vote as petit jurors for forty-six minutes on trial evidence lasting less than a single day. (4 RR). Federal Circuit Courts have recognized the issue is not the unanimity of the vote to convict, but the alternates voice in deliberation on that vote. *See, e.g., United States v. Hayutin*, 398 F.2d 944, 950 (2nd Cir. 1968) cert. denied 393 U.S. 961 (noting fear an alternate might influence the deliberation of the twelve regular jurors); *United States v. Hillard*, 701 F.2d 1052, 1058 (2nd Cir. 1983) (citing *Hayutin).*

Although the petit juror affidavit does not attest to specific deliberation statements, the alternate deliberated as an equal stakeholder in that deliberation. At any level of timbre, tone, and tenor that unauthorized voice argued for conviction with a level of influence in the voted upon verdict against Becerra.

Unlike traditional outside influence cases where information comes from some source outside the jury room, *e.g., McQuarrie* 380 S.W.3d at 148 (overnight internet search by two jurors), the alternate in this case was inside the jury room having listened to the same evidence as the voting petit jurors. This is precisely the danger recognized by Article 36.22. Under the *McQuarrie* standard a possibility exists that a hypothetical juror would be influenced by the forty-six minutes of deliberations and the corresponding vote by the alternate with the twelve petit jurors.

Harm also exists using the presumption of harm standard. The State knew of the presumption of harm applied in Article 36.22 analysis at Motion for New Trial yet they chose not to engage on the merits of Becerra's allegations and extra-record

evidence. Instead, rather than rebut the facial violation, the State chose to stand on their construction of Article 33.001(b) at Becerra's Motion for New Trial hearing. At that hearing the State decided not to alternatively offer controverting affidavits from jurors or subpoena the petit juror attesting to the facts made the basis of Becerra's Motion. Contrast the State's approach to that of the State in *Rojas* in that post-conviction proceeding. There the necessary evidentiary showing was efforted and made by the State. In this case the State should be tied to their decision in 2017 not to controvert Becerra's evidence and a new trial ordered.

GROUND FOR REVIEW TWO

Rule 606(b) of the Texas Rules of Evidence prohibits evidence of "incidents that occurred during the jury's deliberations." The uncontroverted petit juror affidavit admitted at Becerra's Motion for New Trial hearing attested the alternate juror voted on the verdict and after removal and instruction, no further vote was taken. Is the evidence that no further vote was taken an "incident that occurred during the jury's deliberations" under Rule 606(b) and, if excludable, must Rule 606(b) yield to the need to prove a violation of Art. V, Sec. 13 of the Texas Constitution and Art. 33.01 of the Texas Code of Criminal Procedure?

A. The alternate juror voted on the verdict Becerra received in violation of Article V, Section 13 of the Texas Constitution

Article V, Section 13 of the Texas Constitution reads:

> Sec. 13. GRAND AND PETIT JURIES IN DISTRICT COURTS:
>
> COMPOSITION AND VERDICT. Grand and *petit juries* in the District Courts *shall be composed of twelve persons*, except that petit juries in a criminal case below the grade of felony shall be composed of six persons; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall

> be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict.

TEX. CONST. ART. V § 13 (emphasis added).

In *Trinidad II* this Court decided Article V, Section 13 of the Texas Constitution is violated if an alternate juror votes on the verdict received against a defendant in the case on trial. 312 S.W.3d at 27. ("As long as only the twelve regular jurors voted on the verdicts that the *appellant received*.") (emphasis added). If this Court construes Article 33.011(b) to allow the alternate to be present and deliberate in the jury room, the alternate's vote on the verdict received against still violated Article V, Section 13 of the Constitution and Article 33.01(a) of the Texas Code of Criminal Procedure by voting on the verdict received against Becerra. (RR 7; DX 1 [MNT]).

The evidentiary record here established what *Trinidad II* requires: although twelve jurors were in the box when the verdict was received, that verdict against Becerra was voted upon by a number of jurors other than required by Art. V, Section 13 and Article 33.01(a). The legal issue framework is whether the alternate juror voted on the verdict Becerra received, not whether the alternate was in the jury box when the verdict was received by the Court.

Trinidad II directs if evidence exists the verdict was a product of a jury composed of a number other than twelve, it was in violation of Art. V, Section 13.

That the vote on the verdict in Becerra's case was more, rather than less than twelve, does not alter the error inquiry. The evidence admitted at Motion for New Trial hearing confirms this occurred, and the instruction given to the jury after the alternate was separated did not require the petit jury to revote, the jury did not revote, and the returned verdict was the product of a vote of other the number required by the Texas Constitution.

B. The juror affidavit was properly admitted as evidence at Becerra's Motion for New Trial hearing

The admission of the petit juror affidavit at Becerra's Motion for New Trial hearing is at issue on Becerra's Art. V, Section 13 and Article 33.01(a) claims: the affidavit provided extra-record evidence the alternate deliberated on the verdict, voted on the verdict, and no revote occurred after the alternate was removed from the jury room. The Trial Court admitted the juror affidavit over State objection based on Rule 606(b) of the Texas Rules of Evidence at the hearing on Motion for New Trial. (5 RR 13); TEX. R. EVID. Rule 606(b).

The Trial Court commented on the importance of his admissibility decision as to Becerra's Texas Constitutional claims:

> [TRIAL COURT]: If the ruling [admitting the juror affidavit] on 606(b) is incorrect, then clearly you [Becerra] have no evidence to support your motion. And I note that for the appellate court because I feel that possibly this is one of those cases where subsection b does apply and there is an outside influence.

(5 RR 25).

A trial court's decision to admit evidence is reviewed under an abuse of discretion standard. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). A trial court's ruling will not be reversed unless that ruling falls outside the zone of reasonable disagreement. *Id.* The trial court's ruling on admissibility is upheld if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *See, Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002).

1. *Neither evidence of the alternate juror's vote on the verdict nor evidence of the lack of revote on the verdict was an incident occurring during the jury deliberation*

The petit juror affidavit admitted into evidence at the hearing on Becerra's Motion for New Trial attested to the alternate juror's vote on the verdict and the lack of a revote on the first phase verdict. The applicable portions of the rule are as follows:

> RULE 606: JUROR'S COMPETENCY AS A WITNESS
>
> * * *
>
> (b) During an Inquiry into the Validity of a Verdict or Indictment.
>
> > (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
> >
> > (2) Exceptions. A juror may testify:

> (A) about whether an outside influence was improperly brought to bear on any juror.

TEX. R. EVID. Rule 606(b).

If the alternate service under Article 33.011(b) is construed to *not* allow the presence or participation in deliberations by the alternate, the Trial Court evidentiary ruling admitting the petit juror affidavit ((5 RR 12-13; DX 1 [MNT]) at the Motion for New Trial hearing was correct based on Rule 606(b)(A)(2). Should this Court construe Article 33.011(b) so as to allow the presence and deliberation by the alternate in the jury room, the petit juror's affidavit is still admissible on the issue of the alternate's vote on the verdict and the lack of a revote by the re-formed jury after the alternate was removed.

The use of "incident" in Rule 606(b) has never been applied to the act of voting on the verdict or the lack of a revote. It is instead meant to exclude evidence of events involving the deliberative process. *See, e.g., Nichols v. State*, No. 02-13-00566-CR, 2014 W.L. 7779272 at *5-6 (Tex. App. – Ft. Worth 2014, pet. ref'd) (affidavit of defense counsel employee that jurors agreed to average varying terms in prison to reach punishment verdict was properly excluded under rule as "incident."). Incident as used in Rule 606(b) logically should not include the act of voting on the verdict or the lack of revote following a deliberation otherwise protected by Rule 606(b).

Under the evidentiary record in this case, lack of a revote by the re-formed jury on the verdict was a necessary violation of Article V, Section 13 of the Texas

Constitution and Article 33.01(a). The attestation in the petit juror affidavit also rebutted the State's claim that no Article V, Section 13 violation occurred because the ultimate verdict against Becerra was the product of the twelve petit jurors in the box polled after the verdict was received by the Trial Court.

In this fashion, "incident" as it appears in Rule 606(b) should not be used to exclude evidence that the verdict received after the petit jury concluded deliberations and voted on the special issue was tainted. Construing Rule 606(b) to exclude the absence of a revote misconstrues an evidentiary rule excluding only statements or affirmative incidents during jury deliberations but denies Becerra the ability to prove a violation of Article V, Section 13 of the Texas Constitution as interpreted by Court of Criminal Appeals in *Trinidad II*.

2. Rule 606(b) of the Texas Rules of Evidence must yield to the Texas Constitution where the evidence is necessary to prove a Constitutional violation

If Rule 606(b) is found to exclude evidence the alternate voted and the lack of a revote after removal, the affidavit should be admissible under the logic used by the Supreme Court of the United States in *Pena-Rodriguez v. Colorado*, 580 U.S. __, 137 S.Ct. 855 (2017).

In *Pena-Rodriguez*, two juror affidavits alleged a third juror expressed a number of racially charged and biased statements during jury deliberations. *Id.* at 862. The defendant in that case, convicted of a lesser charge, nevertheless sought a new trial based on juror misconduct grounds. *Id.* Based on a Colorado evidentiary rule similar

to Rule 606(b), the trial court ruled the affidavits inadmissible, and that decision was affirmed up the Colorado state court appeal ladder. *Id.*

The United States Supreme Court after granting certiorari, reversed:

> For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 869.

The analogy to this case is the right guaranteed by Article V, Section 13 of the Texas Constitution cannot be enforced without evidence a non-petit juror not just participated but voted in derogation of this guarantee. In a situation in which the judicially promulgated evidentiary Rule 606(b) precludes evidence necessary to enforce a Constitutional right, the evidentiary rule must yield.

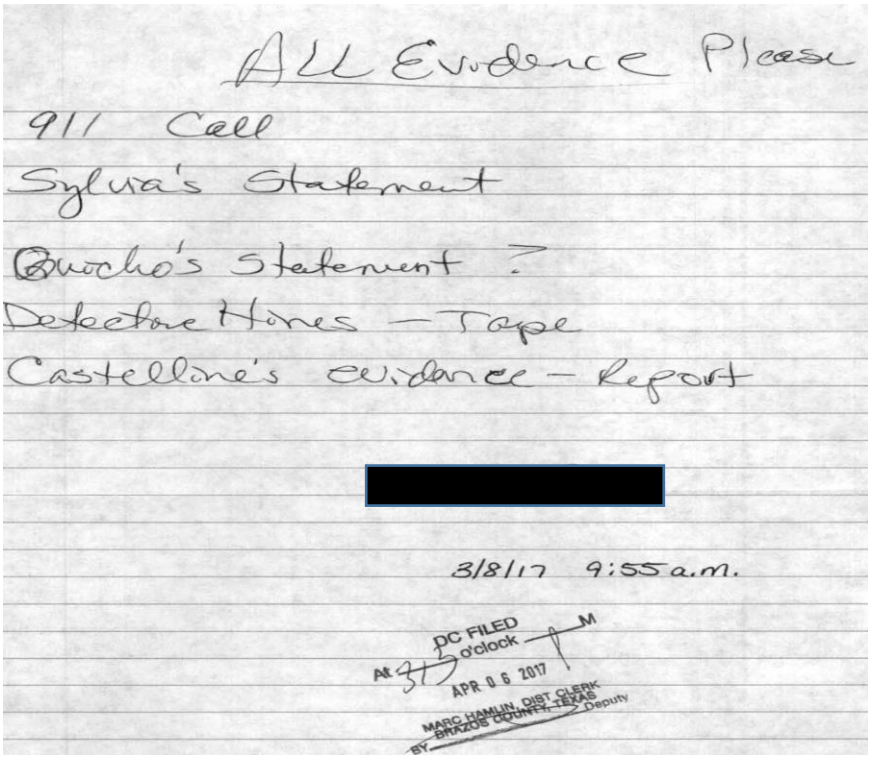
C. <u>The instruction given to the petit jury by the Trial Court following the removal of the alternate juror did not cure the harm to Becerra under any legal standard</u>

(Applicable to all Grounds for Review)

The instruction given to the petit jury after the alternate was discovered and removed from the jury room and following the Trial Court overruling of a Motion for Mistrial was based, at least in part, on Becerra's inability to show harm. (4 RR 41). This instruction was not curative of the Constitutional error supported by the alternate's vote on the verdict.

Trial court instructions are presumed to cure most improprieties occurring during trial. *Bokemeyer v. State*, 355 S.W.3d 199, 203 (Tex. App. – Houston [1st Dist.] 2011, no pet.). In this case the instruction given was not curative. Instead, it affirmatively told the jury to resume deliberations that were at an end on the issue of guilt, and consistent with this instruction the reconstituted jury did not revote.

The timeline[3] from shows the petit jury together with the alternate retired to deliberate at 9:45 A.M. on March 8, 2017. (4 RR 35). Ten minutes later, at 9:55 A.M. the Trial Court received the first jury note. The first jury note is imaged below. The foreperson's name is redacted:


ALL Evidence Please
911 Call
Sylva's Statement
Ovocho's Statement ?
Detective Hines – Tape
Castelline's evidence – Report
[redacted]
3/8/17 9:55 a.m.
DC FILED
A 2 o'clock M
APR 06 2017
MARC HAMLIN, DIST. CLERK
BRAZOS COUNTY, TEXAS
BY Deputy

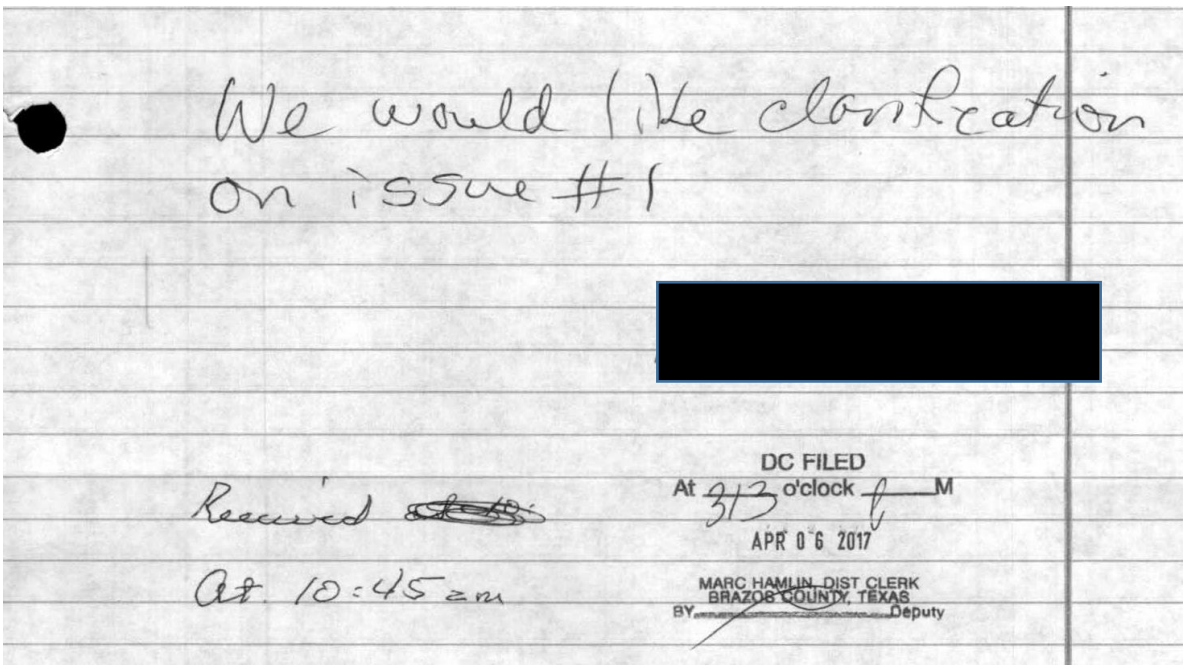
[3] The proceedings from the pre-verdict portion related to the alternate juror were included as evidence admitted at Motion for New Trial. (5 RR [DX 4 [MNT] [offered]; 8 [admitted]). For ease of reference, Becerra's record references will be to the Reporter's Record from the trial of the case in volume four of the Reporter's Record.

Jury deliberations then went awry.

The Trial Court, alternate juror, and Court Bailiff first appear of record without the presence of Becerra, Becerra's Trial Counsel or State Attorneys. (4 RR 35). The Trial Court gave the time, **10:31 A.M.**, stated for the record the alternate was in the jury room from **9:45 A.M.** until **10:31 A.M.** (Id.) The Trial Court stated, "There was no return of verdict at this point." (Id.).

Counsel for the State and Becerra were then brought to the courtroom. (Id.) The time elapse is described in the Reporter's Record as a "brief interruption" but no specific time elapse is noted. (Id.). Whatever the length, enough time elapsed for the visiting Trial Judge to have found, reviewed, and be prepared with *Trinidad II* when the record was resumed with Trial Counsel and at least three Assistant District Attorneys, including the District Attorney's Office appellate trial chief. (4 RR 35-36).

The second jury note on the deadly weapon issue was received by the Trial Court at **10:45 A.M.** (CR 187 [time received noted]). The special issue form appeared after the jury verdict form in the Court's Charge (CR 178). The second jury note is imaged below:


We would like clarification on issue #1

[redacted]

Received [redacted]
At 10:45 am

DC FILED
At 3:13 o'clock P M
APR 06 2017
MARC HAMLIN, DIST CLERK
BRAZOS COUNTY, TEXAS
BY _____ Deputy

The Trial Court discussed the second note twice during the discussions about the alternate's removal, *Trinidad II*, and how to proceed under the circumstances presented. The second jury note is mentioned for the first time with when the attorneys get to the courtroom as follows:

> [STATE'S ATTORNEY]: Judge, one thing [the DAO's chief appellate attorney] pointed out, probably wouldn't hurt, is bring the jury out and instruct them that only 12 are supposed to be deliberating.
>
> [THE COURT]: Well, we got a note here that you may not be aware of --
>
> [STATE'S ATTORNEY]: What did it say?
>
> [THE COURT]: -- and I don't know what it means.
>
> [STATE'S ATTORNEY]: We would like clarification on -- oh, on the deadly weapon.

(4 RR 36-37).

Discussion of *Trinidad II* then ensued with the visiting Trial Judge telling Becerra's Trial Counsel and the State Attorneys, "I pulled that 13th juror, the alternate, out of the jury room immediately when we discovered it at **10:31**. The jury was deliberating beginning at **9:45 a.m.**" (4 RR 39). The visiting Trial Judge thereafter opined based on his reading of *Trinidad II*, "So the failure to object to 13 going back in this case resulted in waiver." (4 RR 39). This was a misreading of *Trinidad II*.

Before the instruction was read to the jury, Becerra's Trial Counsel made a Motion for Mistrial. (4 RR 42). Before denying the Motion, the visiting Trial Judge asked Becerra's Trial Counsel if there was "any indication of harm at this point?" (4 RR 42). Becerra's Trial Counsel responded "No, sir. Not at this point." (Id.) The Trial Court then denied mistrial. (Id.).

The Trial Court then brought the jury in and read the instruction referencing the second note as part of the instruction:

> [TRIAL COURT]: Members of the jury, jury deliberations began at 9:45 a.m. At 10:31 a.m., the Court realized that the alternate juror, [alternate juror name], was allowed into the jury room by mistake and [alternate juror] was at that time asked to separate from the jury. [Alternate juror name] has been placed in a separate room over here and he will continue to serve as the alternate juror in this case. He simply cannot be present during the deliberations of the 12 jurors. You are to disregard any participation during your deliberations of the alternate juror, [alternate juror name]. *And following an instruction on this extra note that the Court received, you should simply resume your deliberations without [alternate juror] being present.*
>
> *Now, at 10:45 a.m., the Court received the following note from the jury room* - it's signed by [foreperson]. We would like clarification on issue No. 1. In response to that note the Court does not understand what your concerns are and the issue that you're raising is not clear enough for me to be able

> to give you any further instruction or evidence on the matter about which you have inquired. You are free to clarify that in writing, signed by the presiding juror after you have resumed your deliberations.
>
> Without further instruction the *jury minus [alternate] juror is instructed to resume your deliberations.*
>
> [Alternate juror], if you could, just return back to the side room over here.
>
> Thank you very much and the jury may resume your deliberations.

(4 RR 43-44 (emphasis added)).

The jury was deliberating on the special issue when the curative instruction was given to them. The record shows at the same time the visiting Trial Judge read the curative instruction he referenced the second jury note received at 10:45 A.M. and its request for clarification on the special issue. (4 RR 43-44).

The instruction did not instruct the re-formed jury to restart deliberations from the beginning without the alternate's voice. The instruction *did* tell the re-formed jury to disregard participation by the alternate but, based on evidence later admitted at Motion for New Trial, the first phase verdict against Becerra had already been deliberated upon and voted on by the twelve petit juror and the alternate. The instruction did not instruct the re-formed jury to redeliberate and revote as a re-formed jury composed of twelve as required by Art. V, Sec. 13 and Article 33.01(a).

Instead, the instruction compounded harm by instructing the jury to "resume [the jury's] deliberations without [the alternate juror] being present." (4 RR 43-44). The instruction affirmatively told the re-formed twelve-person jury to resume

deliberations on the issue that they were then deliberating on at 10:45 A.M. (CR 187) – the deadly weapon special issue.

The post-conviction Motion for New Trial proceedings provided the Trial Court with extra-record affirmative evidence that a number other than twelve voted on the verdict and no revote occurred on the verdict received. The Motion for New Trial gave the Trial Court the chance to view the instruction in context with the events in the jury room as attested by petit juror's affidavit.

The Motion for New Trial evidentiary record demonstrated why the instruction was defective, how Becerra was harmed by the deliberation, the vote of more than twelve jurors and the lack of a revote by the re-formed jury composed of twelve persons. This second opportunity to correct error was denied by the Trial Court.

The defective, affirmatively harmful instruction is contrasted with the situation presented in *Gonzalez v. State*, 616 S.W.3d 585 (Tex. Crim. App. 2020). In *Gonzalez,* an alternate juror was substituted for a petit juror during punishment phase deliberations. *Id.* at 589-90. The two alternates had been allowed in the jury room during deliberations but participation had been limited, without objection, to presence. *Id.* at 588. On appeal the defendant argued it was Sixth Amendment error not to instruct the reconstituted jury to begin deliberations anew. *Id.* 591. This Court held trial counsel had waived the issue because the nature of the objection and trial counsel's request lacked necessary specificity. *Id.*

This Court went on in *Gonzalez* to hold the trial court's instruction at the time the alternate was substituted cured any Constitutional error. *Id.* at 593-94. After considering Federal Circuit cases on the issue this Court observed that "the trial court did not prohibit the jury from beginning its deliberations anew, and the verdict was adopted by each juror individually in the post-verdict poll." *Id.* (citation omitted).

Significant to this case, this Court wrote that the *Gonzalez* trial court statement, "'[w]hat has been decided should remain. Period[.]'", *Id.*, was made outside the presence of the jury. This Court also wrote of the importance of a proper curative instruction: "An instruction to deliberate anew can operate as a valuable procedural safeguard to ensure that a re-formed jury deliberates with the new members." *Id.* (citations omitted). Under this record the harm of the alternate's vote on the verdict in this case was not cured by the instruction given to the re-formed jury.

In this case the jury was not re-formed with a new member. Instead, the jury was re-formed without the alternate. Unlike the instruction in *Gonzalez* that did not affirmatively tell the jury not to redeliberate, the instruction in this case affirmatively instructed the jury to "simply resume" deliberations on what they were deliberating upon at the time the instruction was given – the deadly weapon special issue.

Additionally, under the facts of this case, the post-verdict polling of the jury did not alter or cure the fundamental problem with events as developed at Motion for New Trial stage. Although each of the twelve in the box when the polling took place affirmed the verdict was theirs, the verdict they delivered and affirmed as theirs was

not a product of those twelve jurors. It was instead the product of more than Constitutionally and statutorily permitted.

Although the petit jury also made a deadly weapon affirmative finding, the harm to Becerra is the violation of his Constitutional guarantee of a twelve-person jury. Specifically, the harm is whether the State met their Constitutional obligation to prove guilt, not the special issue decision on statutory based parole eligibility.

D. Becerra suffered Constitutional harm under Rule 44.2(a)

In *Trinidad I*, the San Antonio Court of Appeals engaged in a constitutional harm analysis on Article V, Section 13. *Trinidad I,* 275 S.W.3d at 60-61. Though later reversed on other grounds by this Court, the Court of Appeals analysis is informative as a framework for measuring constitutional harm on a violation of Art. V, Section 13.

The San Antonio Court of Appeals cited two cases previously examined in Becerra's briefing, *Bogue v. State*, 204 S.W.3d 828 (Tex. App. – Texarkana 2006, pet. ref'd) and *Rojas v. State*, 171 S.W.3d 442 (Tex. App. – Houston [14th Dist.] 2005, pet. ref'd). As previously briefed, in neither case did the alternate vote.

The San Antonio Court of Appeals noted the constituted jury in *Trinidad* was affirmatively instructed to *allow* the alternate to deliberate. In this case, although there was no front-end instruction of the kind given in *Trinidad* instructing the petit and alternate juror to deliberate but not vote, the alternate juror deliberated and voted while in the jury room.

The forty-six minutes the alternate was in the jury room was a period of more than three times longer than the alternate juror in *Bogue* and *Rojas*. The San Antonio Court of Appeals wrote, "Accordingly, we cannot conclude, beyond a reasonable doubt, that the alternate juror's presence in the jury room did not contribute on the conviction[.]" *Trinidad I* at 61.

In this case the evidence is affirmative, based on the jury notes and the petit juror affidavit, that the jury and the alternate were deliberating within minutes of retiring at 9:45 A.M. As in *Trinidad*, and unlike *Bogue* and *Rojas,* evidence exists here that the alternate juror was a full participant for an extended period of time and the alternate voted on the verdict. Using this same framework, Becerra has demonstrated constitutional dimensioned harm. Rule 44.2(a) TEX. R. APP. PRO.

Harm may be more apparent where less than twelve jurors returned a verdict in a felony case. S*ee, e.g., McClellan v. State*, 143 S.W.3d 395, 401 (Tex. App. – Austin 2004, no pet.) (Constitutional error with less than twelve jurors because it lessened the State's burden of proof.). Harm of a similar nature exists under Becerra's construction of Article 33.011(b) that alternates cannot participate in deliberations.

In that construction, Constitutional harm is grounded at least in part to the alternate's additional improper participation in deliberation – whatever the tone and tenor of their deliberative voice to other jurors – and those jurors to the alternate – that reflect their later unconstitutional vote to convict. *See, e.g., United States v. Hayutin*, 398 F.2d 944, 950 (2nd Cir. 1968) cert. denied 393 U.S. 961. (Noting the fear that

alternate might be in a position to influence the deliberation of the twelve regular jurors.).

If construction of Article 33.011(b) is that an alternate can be present in the jury room and deliberate, then a harm standard must be established by this Court for the Constitutional violation. *See, Trinidad II* at 27 (noting that in earlier years when death or disability occurred to a regular juror Article V, Section 13 harm was fundamental in nature.). An argument that a verdict received by more than twelve petit jurors is immune from Article V, Section 13 infirmity is inconsistent with the text of the Texas Constitutional provision that by its terms requires a specific number of jurors to vote on the verdict received against a defendant on trial.

PRAYER FOR RELIEF

The Court of Criminal Appeals should, following written submission, reverse and remand this case to either the Trial Court, or alternatively, to the Tenth Court of Appeals with instructions to perform harm analysis with standards for harm this Court determines are applicable to the Constitutional and statutory error argued here by Becerra.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

This Brief complies with TEX. R. APP. P. 9.4(i)(2)(D) in that it contains 11,912 words, in Microsoft Word 2019, Garamond, 14 point.

/s/ LANE D. THIBODEAUX
LANE D. THIBODEAUX

CERTIFICATE OF SERVICE

I certify that a copy of this Brief has been delivered *via* electronic filing on this the 6th day of September, 2022 to the following:

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APPENDIX 1

Text of 2007 Amendment to HB 1086

JOE LUIS BECERRA

V.

STATE OF TEXAS

CASE NO. PD-0280-22

IN THE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

By: Hughes H.B. No. 1086

A BILL TO BE ENTITLED

AN ACT

relating to the discharge of an alternate juror in a criminal case.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 33.011(b), Code of Criminal Procedure, is amended to read as follows:

(b) Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury renders a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment [~~retires to consider its verdict~~], become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn and selected in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, security, and privileges as regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment [~~the jury retires to consider its verdict~~].

SECTION 2. Article 36.29(d), Code of Criminal Procedure, is amended to read as follows:

(d) After the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment [~~the charge of the court is read to the jury~~], the court

shall discharge an alternate juror who has not replaced a juror.

SECTION 3. The change in law made by this Act applies only to a trial commenced on or after the effective date of this Act. A trial commenced before the effective date of this Act is covered by the law in effect when the trial was commenced, and the former law is continued in effect for that purpose.

SECTION 4. This Act takes effect September 1, 2007.

APPENDIX 2

Bill Analysis of HB 1086

JOE LUIS BECERRA

V.

STATE OF TEXAS

CASE NO. PD-0280-22

IN THE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

BILL ANALYSIS

H.B. 1086
By: Hughes
Criminal Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Currently under the Code of Criminal Procedure, an alternate juror must be discharged when the jury retires to consider a verdict of guilt or innocence. This can become a problem if during deliberation or the penalty phase a regular juror is excused. H.B. 1086 would delay the discharge of the alternate juror until a verdict has been rendered or, if applicable, the penalty phase has been completed.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

H.B. 1086 amends Article 33.011(b), Code of Criminal Procedure, to provide that an alternate juror is required to replace jurors, who become or are found to be unable or disqualified to perform their duties, prior to the time the jury renders a verdict on the guilt or innocence of the defendant, and if applicable, the amount of punishment. An alternate juror who does not replace a regular juror is required to be discharged after the jury has rendered a verdict on the guilt or innocence of the defendant, and if applicable, the amount of punishment. The bill strikes the requirement that alternate jurors shall replace unable or disqualified jurors up until the jury retires to consider its verdict.

The bill also amends Article 36.29(d), Code of Criminal Procedure, to provide that after the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment, the court is required to discharge an alternate juror who has not replaced a juror. The bill strikes the requirement that an alternate juror who has not replaced a juror be discharged after the charge of the court is read to the jury.

EFFECTIVE DATE

September 1, 2007.

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Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
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