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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,
Appellant

V.

THE STATE OF TEXAS,
Appellee

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 REPLY BRIEF TO STATE'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Sources

SUMMARY OF THE ARGUMENT

The State's Brief does not address statutory construction issues, choosing instead to focus on harm. Becerra's Reply Brief analyzes the two distinct provisions of Art. 36.22 of the Texas Code of Criminal Procedure written on in *Laws v. State*, No. 06-19-00221-CR (2022 WL 2811958 (Tex. App. – Texarkana July 19, 2022, pet. pending) (not designated for publication). Participation in the deliberations by the alternate juror – extending to the alternate's participating in the first jury note – and later vote on the first phase verdict triggers a rebuttable presumption of harm. The State here, unlike other cases decided under the rebuttable harm presumption, chose not to rebut Becerra's evidence at Motion for New Trial stage.

The State's timeline is problematic on the Art. V, Section 13 violation and harm resulting from the violation. A full timeline reveals the alternate participated in jury deliberations for almost one-half of total jury deliberations, ultimately resulting in his vote on the first phase verdict, with no revote on the first phase verdict 29 minutes after the jury was recomposed and defectively instructed.

The procedural safeguards present in *Gonzalez v. State*, 616 S.W.3d 361 (Tex. Crim. App. 2021) leading to this Court finding lack of Constitutional harm in that case are absent here. Becerra also provides a framework for Constitutional harm focusing on the lengthy participation by the alternate in the deliberations that led to his vote on the verdict received by the Trial Court.

ARGUMENT

REPLY TO GROUND FOR REVIEW ONE

The State's Brief fails to distinguish between the two distinct provisions of prohibited conduct under Art. 36.22 of the Texas Code of Criminal Procedure and the rebuttable presumption of harm under that statute attached based on the petit juror affidavit and the first jury note's request for evidence in a deliberation that included the alternate juror

The State's Merit Brief ("State's Brief") argues – to exclusion of the statutory construction of Art. 33.011(b) – violations of Art. 36.22 of the Texas Code of Criminal Procedure and Art. V, Section 13 of the Texas Constitution are harmless. The State's Brief chides Becerra's Brief on the Merits ("Becerra's Brief") with strawman arguments and evasion of presented issues of a needed construction of Art. 33.011(b), violations of Art. 36.22 of the Texas Code of Criminal Procedure, and their interplay with Rule 606(b) of the Texas Rules of Evidence.

At Motion for New Trial stage in the Trial Court the State claimed the petit juror affidavit was inadmissible under Rule 606(b). (5 RR 8). The State now all but abandons this argument in service of shortcutting to favored harm arguments. For Becerra – and this Court – the issue is not abstract. If Art. 33.011(b) is construed so alternate juror service does not allow presence or deliberation in the jury room, facial statutory violations occurred and a harm analysis framework is necessary. Regardless of construction, if the alternate voted on the verdict received, a constitutional harm framework under Rule 44.2(a) of the Texas Rules of Appellate Procedure is necessary.

This case is the first to present – based on Becerra's research – a preserved record to decide on Art. 36.22 violations and a harm standard framework for those violations. This Court has not written on how harm in such circumstances is shown under a rebuttable presumption of harm, the applicability of *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim App. 2012) to harm standards, and/or applicability in such circumstances to Rules 44.2(a) and (b) of the Texas Rules of Appellate Procedure.[1] The State's Brief does not address *McQuarrie* except on standard of review. (State's Brief, pgs. 14-15). Becerra's Brief addresses the *McQuarrie* harm standard in the context of Art. 36.22. (Becerra's Brief, pgs. 17-19).

With these considerations, Becerra's Reply Brief focuses first on the record evidence of harm existing under Art. 36.22 of the Texas Code of Criminal Procedure. If the alternate was not a member of the jury, both provisions in Art. 36.22 were violated and harm exists under any construction of attachment of the presumption of harm to the two distinct provisions contained in that statute. Becerra's second reply point focuses on Constitutional harm under Article V, Section 13 because a non-juror

[1] The State cites Judge Newell's concurring opinion in *Maciel v. State*, 631 S.W.3d 720, 727 (Tex. Crim. App. 2021) (Newell, J. concurring) that harm analysis is a proper undertaking when there are "established harm standards." Harm standards involving rebuttable presumption of harm, non-constitutional harm, and constitutional harm under Rules 44.2(a) and (b) of the Texas Rules of Appellate Procedure are well established. However, this Court has never been confronted, to Becerra's knowledge, with a preserved, merit-based decision involving presented violations of Art. V, Section 13 or harm after construction of Arts. 33.011(b) and 36.22. Nevertheless, harm is here briefed.

fully participated in forty-six minutes of deliberations without voting jurors knowledge of the non-juror's difference in rank and responsibility.

A. Laws v. State and violation of Art. 36.22's two distinct provisions

The State's Brief does not distinguish nor address the two different types of violations defined by Art. 36.22. The statute prohibits non-juror presence with the jury while deliberating in the statute's first sentence and conversing with a juror at any stage of trial in its second sentence. TEX. CODE CRIM. PRO. ART. 36.22. This Court could choose to address harm standard differences, if any, that exist under the different prohibited conduct defined in Art. 36.22. Violations of both sentences of Art. 36.22 occurred under Becerra's statutory construction of Art. 33.011(b).

Becerra's Brief also discussed the Texarkana Court of Appeals decision in *Laws v. State*, No. 06-19-00221-CR, 2022 WL 2811958 (Tex. App. – Texarkana July 19, 2022, pet. pending) (not designated for publication). (Becerra's Brief, pg. 14-15). In *Laws*, the Court of Appeals distinguished between the first and second sentences of Art. 36.22, commenting that because the defendant's complaint in that case implicated only the first sentence of Art. 36.22 "we do not believe [defendant] is entitled to any [rebuttable presumption]." *Id.* at *6. The Court of Appeals in *Laws* did not distinguish between that sought to be protected by the two provisions.

The Court of Appeals in *Laws* wrote, "'Without a showing that the alternate juror actually *participated* in deliberations or *communicated* with the regular jurors *about the*

case, [Appellant] has not met his initial burden to raise a presumption of harm.'" *Id.* (quoting *Hendrix v. State*, No. 05-18-00822-CR, 2020 WL 3424915, at *4 (Tex. App. – Dallas June 23, 2020, no pet.) (not designated for publication) (emphasis added). Thus, Court of Appeals in *Laws* analyzed harm under Rule 44.2(b) of the Texas Rules of Appellate Procedure for non-constitutional harm, *Id.* at *7, finding no harm based on the strength of the evidence presented at trial. *Id.*

B. Harm analysis for violations of the two distinct provisions of Art. 36.22

From a harm perspective, it is incongruous for different harm standards – the presumption of harm – to attach to the second sentence in Art. 36.22 while simultaneously recognizing the stricter legislative prohibition of the presence of a non-juror during the elevated importance of the deliberations stage in Art. 36.22's first sentence. The presumption should logically attach to the first sentence if the evidence establishes a non-juror's *presence* – as opposed to participation or communication – with the composed jury during deliberations. Regardless, harm exists in this record under any construction of the harm presumption to these two provisions

The State's Brief argues a rebuttable presumption of harm does not attach because the juror affidavit admitted at the hearing attested only that the alternate "participated" in forty-six minutes of jury deliberations and voted on the verdict. The affidavit's fatal defect, according to the State's Brief, is the lack of attestation the alternate said something during his forty-six-minutes of participation and vote.

(State's Brief, pg. 30). This argument is both hyper-technical and fails to acknowledge the first jury note (CR 188) received at 9:55 A.M. from the jury room, ten (10) minutes after the regular jurors and alternate together retired to deliberate at 9:45 A.M. (4 RR 36; CR 17). This jury note was a collective request from the twelve regular jurors *and the alternate* through their presiding juror for specific evidence for their deliberation that continued for another thirty-six (36) minutes.

The State's Brief sole authority for this legal proposition is the Court of Appeals decision below. *Id.* (citing *Becerra v. State*, No. 10-17-00143-CR, 2022 WL 1177391 at *7-8 (Tex. App. – Waco April 20, 2022, pet. granted) (not designated for publication)). "Participate," according to the Merriam-Webster Dictionary, is a transitive verb defined as to "take part in." That dictionary's common usage example is instructive: "always participates in class discussions." https://www.merriam-webster.com/dictionary/participate (accessed November 17, 2022).

On this record, the evidence establishes the alternate participated in forty-six (46) minutes of deliberations culminating in participation in a vote on the verdict. Violations of both sentences of Art. 36.22 occurred and the presumption of harm attached, even if the presumption is limited to the second sentence of Art. 36.22. This conclusion is supported by language cited favorably in *Laws*, namely, that lack of evidence of "participation" by a non-juror was insufficient to trigger the presumption. *Laws*, supra at *6 (quoting *Hendrix*). This record affirmatively establishes that which

was absent according to the Court of Appeals in *Laws* – full participation by the alternate in deliberations culminating with the alternate's vote on the verdict.

The State's Brief takes the legal position the presumption does not attach so they can avoid its effect. The State offered no evidence at the Motion for New Trial hearing to rebut harm if the presumption attached. The cases cited in the State's Brief on this issue support Becerra in both the triggering of the presumption and illustrate how the State's failure to rebut that presumption results in harm.

For example, the State's Brief relies on *Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997) (State's Brief, pg. 30). *Quinn* involved an Art. 36.22 juror misconduct allegation under the second sentence of Art. 36.22. *Quinn* at 397; 401-402. In *Quinn*, a juror had a phone call that included use of language that included a comment by the juror that "You know because you can't kill them, and the most you can give them is life or 99 years and that means they are out in 10." *Id.* at 397.

Testimony was taken at a hearing on a Motion for New Trial and the trial court denied the Motion. *Id.* at 399. This Court determined the presumption of harm attached but was rebutted at Motion for New Trial stage after testimony was taken from all twelve jurors. *Quinn*, 958 S.W.2d at 401-402. ("Juror Thomas testified that he was not [influenced]…The other eleven jurors also testified that [juror] Thomas did not convey such conversation").

In *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009), the legal issue before this Court was the denial of a pre-deliberation defense motion for mistrial because of an allegation of violation of Art. 36.22's second sentence. In *Ocon*, a juror was overheard making comments during a break on the phone about the case on trial. *Id.* at 885-887. This Court held that in the absence of record evidence that the juror was receiving information from the non-juror on the call, the issue was procedurally defaulted. *Id.* This Court noted it was incumbent on the defendant to make some evidentiary showing of what happened, for example, to ask the trial court for the juror be interviewed to determine if less drastic means than mistrial was available. *Id.*

The evidentiary record lacking in *Ocon*, but existing in *Quinn,* was made in this case. Unlike the evidentiary showing in *Quinn*, the presumption of harm in this case was not rebutted at Motion for New Trial stage. In sum, under any interpretation of the presumption of harm to the two distinct prohibitions of Art. 36.22, the presumption attaches on this record and that presumption was unrebutted by the State at the Motion for New Trial hearing.

REPLY TO GROUND FOR REVIEW TWO

The verdict received by the Trial Court was voted on by the alternate, the State's Brief uses a problematic timeline analysis, and Constitutional harm under Rule 44.2(a) of the Texas Rules of Appellate Procedure should consider the defective instruction and the almost one-half of deliberation time participated in by the alternate juror

The evidence at Motion for New Trial stage was uncontroverted that more than twelve jurors voted on the first phase verdict and no revote on that verdict was

taken after the alternate was removed from the jury room or after the regular jurors were instructed. Thus, the factual record is uncontroverted that the first phase verdict received, read in open court, and used to convict Becerra was the product of a vote of a number other than required by Art. V, Section 13 of the Texas Constitution. TEX. CONST. ART. V § 13.

The State's Brief does not dispute the fact of a vote by more than twelve jurors or the absence of a revote by the reconstituted jury. The State has offered instead legal arguments evading what is factually uncontroverted. The first is that the Trial Court's instruction cured the vote by more than the required twelve because the instruction provided the recomposed jury the opportunity to revote, even if no revote occurred. The State's second argument is there is a difference between the vote taken on the verdict by a number different than required by the Texas Constitution and the ultimate verdict received by the Trial Court. Both are fictions not supported by the evidentiary record or the current state of the law.

A. The State's problematic timeline

The State's Brief attempts a timeline to support their arguments: "The petit jurors continued deliberating for an hour after the alternate's removal and 29 minutes after being instructed to disregard the alternate's participation. [record citations]. Only then did the twelve petit jurors deliver the *ultimate* verdict that Appellant *received*." (State's Brief, pg. 33) (emphasis in the original).

The jury retired to deliberate at **9:45 A.M.** (4 RR 35; CR 17). The first jury note – with the alternate fully participating – asking for evidence was received by the Trial Court at **9:55 A.M.** (CR 188). The alternate was removed from the jury room forty-six (46) minutes after retiring at **10:31 A.M.** (4 RR 35). The second jury note inquiring about the deadly weapon special issue was received by the Trial Court at **10:45 A.M,** during full swing discussions about the legal effect of the alternate's presence in the jury room during deliberations. (CR 187 [note]; 4 RR 36-37 [full swing discussions]).

The jury deliberated without instruction after the alternate's removal from **10:31 A.M.** to **11:01 A.M.** During that time the jury was not yet recomposed with instructions and inquired about the special issue submission. (CR 187). The jury – as a reconstituted and instructed unit – resumed deliberations at **11:01 A.M.** (4 RR 44). The instruction did not inform the jury to either restart deliberations on the first phase or to revote, if necessary, on the first phase verdict.

The instructions also included a response to the second note on the special issue ("In response to the [second] note [received at 10:45 A.M.] 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 inquire." [4 RR 43-44]). The reconstituted jury returned a first phase verdict and special issue finding at **11:30 A.M.** (CR 17).

Thus, the jury deliberated a total of a **one hundred and five (105) minutes** on trial evidence lasting less than a day. The alternate fully deliberated with regular jurors for **forty-six (46) minutes** – almost half of the total deliberation time. **Twenty-nine (29) minutes** of deliberations occurred after the petit jury was recomposed and instructed without revote on the first phase verdict. In that twenty-nine minutes the recomposed jury assimilated the jury instruction that told them to "simply resume your deliberations without the [alternate juror] being present" [4 RR 43] with the additional instruction related to the second jury note on the special issue.

B. Gonzalez v. State is consistent with finding Constitutional harm occurred in this case

Gonzalez v. State, 616 S.W.3d 585 (Tex. Crim. App. 2021), cited by the State's Brief at length, is consistent with a Constitutional harm finding in this case. *Gonzalez* was also discussed in Becerra's Brief at length. (Becerra Brief, pg. 32-33). *Gonzalez* involved alternates that replaced regular jurors during the death penalty punishment phase trial. These alternates had been permitted, without objection, to be present but not deliberate during the first phase and death penalty phases of trial. *Id.* at 588.

One of the regular jurors, R.P., was replaced by an alternate, S.F., during the punishment phase. *Id.* at 589. The recomposed jury was not instructed nor were the other jurors told R.P. had been excused. *Id.* S.F., the replacement juror, was told by the trial court they could join in deliberations. *Id.* In holding no Sixth Amendment

error in failing to instruct the reconstituted jury to begin punishment deliberations anew, this Court held as follows:

> Assuming that an error occurred, we will reverse only upon a finding of harm under the applicable analysis. We conclude that, even if the Sixth Amendment required the trial court to instruct the reconstituted jury to deliberate anew, the error in failing to do so was harmless beyond a reasonable doubt **under the circumstances of this case** in which the alternates attended deliberations before the substitution, 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. at 593 (emphasis added) (emphasis added).

In the circumstances of this case, the alternate not only attended deliberations, but participated fully in them – to the extent he was part of the jury that requested evidence in the first jury note – and that participation extended not to deliberations but also to the vote on the verdict received by the Trial Court. This Court recognized within the context of the Sixth Amendment there is a split on whether an instruction to begin deliberations anew is essential. *Id.* at 592-593.

In agreeing with the Fourth, Sixth, Seventh, and Eleventh Federal Circuit Courts of Appeal, this Court held error is not structural.[2] This Court went on to write, "But like the other circuit courts of appeals, [these circuit courts] have also made fact-

[2] The State's Brief makes a strawman argument that Becerra argues structural harm. (State's Brief, pgs. 26-29). Becerra's briefing on Constitutional harm is based on the alternate's improper participation in the deliberations that led to 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 that the alternate might be in a position to influence the deliberation of the twelve regular jurors) (Becerra Brief, pg. 34-36). Becerra has maintained a vote of more than twelve is as Constitutionally infirm as a vote of less than twelve and that a Constitutional harm framework must exist for a violation. (Becerra Brief, pg. 36). His briefing has attempted to put forward such a framework.

specific inquires focused on the overall procedural safeguards that were in place to preserve the jury's 'essential feature.' And these courts, too, have sometimes note the length of time that the reconstituted jury deliberated." *Id.* at 593 (citations omitted).

In the context of a Texas Constitutional violation of a specific, required number of jurors to vote on the ultimate verdict received, the instruction given by the Trial Court was affirmatively defective in light of the extra-record evidence in ways detailed in Becerra's Brief. (Becerra Brief, pg. 33). Additionally, as detailed in Becerra's Brief, the alternate was deliberating with regular jurors within minutes of retiring and continued to participate in deliberations for almost half of the total deliberation time.

The deliberation time of the alternate with the regular jurors is in contrast to the reconstituted jury deliberating twenty-nine (29) minutes after being instructed – a factor in Sixth Amendment harm analysis cited favorably by this Court in the Fourth, Sixth, Seventh and Eleventh Circuit Courts of Appeals. *Id.* at 593. In short, the procedural safeguards present in *Gonzalez* are absent or affirmatively harmful here.

When the defense-initiated Motion for Mistrial was made at trial the visiting Trial Judge knew of the second jury note from the not yet recomposed and instructed jury inquiring about the special issue appearing after the first phase jury verdict form. The Trial Court nevertheless denied the Motion, (4 RR 42), specifically noting that harm had not been shown but adding, "I won't bar you from urging it at a later

point." *Id.* At Motion for New Trial stage the presiding judge, who did not try the case, had the benefit of additional, extra record evidence that the alternate had voted on the verdict and no revote occurred. The Trial Court nevertheless denied the Motion for New Trial. Thus, two opportunities for Trial Court cure existed yet neither opportunity was utilized.

C. Constitutional harm in this case includes the unauthorized participation of the alternate in almost half of the deliberations

Becerra has attempted to address harm issues neither this Court nor intermediate courts of appeal have had opportunity to address for violations of Article V, Section 13 when greater than twelve jurors participated in deliberations and voted on the verdict. In *McClellan v. State*, 143 S.W.3d 395 (Tex. App. – Austin 2004), less than twelve voted and harm was shown because of a lessened burden of proof. *Id.* at 401. When less than twelve vote on a verdict burden of proof harm is self-evident.

When the verdict received by the trial court is the product of a number greater than what the Texas Constitution requires, harm is logically more nuanced. Although this Court has not previously had the opportunity to provide a framework on what Constitutional harm looks like where greater than the required twelve juror vote, the harm here is the alternate's participation in almost half of the total deliberation time, the evidence that those deliberations had resulted in a verdict at the time of the alternate was removed, and the defective instruction given by the Trial Court at 11:01 A.M. to "resume deliberations" and evidence that no revote was taken.

In sum, it is not that thirteen jurors found Becerra guilty or that twelve jurors later made the affirmative parole eligibility instruction finding that defines harm. It is that the alternate participated fully in deliberations resulting in the first phase vote making it impossible to find beyond a reasonable doubt that Constitutional error was harmless. The alternate's improper voice and participation in the resulting unconstitutional vote define the harm.

This is not an abstract exercise in harm. It is not necessary under Constitutional harm standards for Becerra to marshal evidence of a split in the jury room before the alternate was removed. With Constitutional harm, it is the State's responsibility to show beyond a reasonable doubt harm did not occur. The opportunity for the State to marshal such evidence existed at Motion for New Trial stage and the State did not pursue or present such evidence

Finally, the jury poll – because the verdict was a product of not just the twelve in the box, but of the twelve petit jurors *and* the alternate – did not cure the fundamental Constitutional and statutory flaw requiring that verdict be a product of those twelve in the box when the verdict was formally received. To so hold is to indulge in a legal fiction that ignores the plain text of Art. V, Section 13 and the uncontroverted extra-record evidence pursued and admitted at Motion for New Trial.

PRAYER FOR RELIEF

The Court of Criminal Appeals should construe Art. 33.011(b) to not allow alternate jury service to extend to presence or deliberation in the jury room once regular jurors retire to deliberate unless a regular juror is disabled. This Court should also find under the circumstances of this case violations of Art. 36.22 of the Texas Code of Criminal Procedure and Art. V, Section 13 of the Texas Constitution and that harm occurred under both these provisions.

Alternatively, this Court should find violations of these provisions occurred, provide guidance on harm, and remand this case to the Court of Appeals for harm analysis based on that guidance.

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 4,069 words, in Microsoft Word 2019, Garamond, 14 point.

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CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief has been delivered *via* electronic filing on this the 20th day of November, 2022 to the following:

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