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COURT OF CRIMINAL APPEALS
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**PD-0280-22**

**IN THE COURT OF**

**CRIMINAL APPEALS OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
6/21/2022
DEANA WILLIAMSON, CLERK

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**JOE LUIS BECERRA**

**V.**

**THE STATE OF TEXAS**

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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

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# APPELLANT'S RESPONSE TO STATE'S REPLY TO PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT PREVIOUSLY REQUESTED

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### First Response to State's Reply

The State's Reply did not substantively respond to Becerra's reasons for discretionary review: the need for statutory construction of Art. 33.011(b) to determine alternate juror status when the uncontroverted evidence supports alternate presence, participation and/or voting during petit jury deliberations on preserved claims brought under Art. 36.22 of the Texas Code of Criminal Procedure and Art. V, Section 13 of the Texas Constitution

The State's Reply does not substantively engage on Becerra's Grounds for Review. That issue, whether Art. 33.011(b) of the Texas Code of Criminal Procedure, as amended in 2007, authorizes the presence of the alternate in the jury room and, if so, if the alternate can deliberate with the petit jury.

This unresolved statutory construction issue has repeatedly been before this Court but without the developed record present in this case. *Trinidad v. State*, 312 S.W.3d 23, 28 fn. 24 (Tex. Crim. App. 2010) ("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)."); *Becerra v. State*, 620 S.W.3d 745, 746 (Tex. Crim. App. 2021) (error preservation) (*Becerra II*); *Laws v. State*, 640 S.W.3d 227 (Tex. Crim. App. 2022).

This has been a persistent issue for trial courts impaneling juries with alternates. What is the alternate juror's legal status? Is a trial court required to separate the alternate from the petit jurors before deliberations? If so, does the trial court release the alternate with instructions, subject to recall or isolate the alternate during the

pendency of petit juror deliberations? Does a trial court permit the alternate into the jury room to be present for deliberations without violating the first sentence of Article 36.22? Is an alternate allowed to deliberate without violating the second sentence of Article 36.22?

The legal issue is significant. Is an alternate without juror status under Articles 33.011(b) and 33.01 once deliberations begin? If so, is the alternate a legal outsider – and thus more of a danger than the ordinary outsider – to the integrity of the petit jury as a deliberative and voting body? *See* TEX. CODE CRIM. PRO. ART. 36.22. *See, also, 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.").

The evidentiary record in this case is developed on the grounds for review and allows this Court to decide these practical issues confronted by trial courts. Review on this record will also provide needed guidance concerning what protocols, if any, need to be undertaken by trial courts to protect petit jury integrity, unless a contingency changes the alternate's status to that of petit juror.

The State's failure to engage in their Reply on the construction of Art. 33.011(b) is also contrary to their legal position at Motion for New Trial. There the State argued the alternate juror was part of the composed jury and allowed to be present during deliberations under Article 33.011(b). (5 RR 12). ([State's Attorney]: "I

believe that means that the court of criminal appeals has found [in *Trinidad*] -- plus with the reading of 33.011(b) that the presiding juror -- or alternate juror, excuse me, can be in the [jury] room."). The State's position was the alternate was a part of the jury and the petit juror affidavit was inadmissible as evidence of outside influence. (5 RR 8). The Trial Court admitted the affidavit. (5 RR 13). TEX. R. EVID. 606(b)(2)(A).

Evidence that the alternate juror voted on the verdict is necessary for violation of Article V, Section 13. *See,* TEX. CONST. ART. V, § 13; *Trinidad v. State*, 312 S.W.3d 23, 28 (Tex. Crim. App. 2010) ("As long as only the twelve regular jurors voted on the verdicts that the appellants received, it cannot be said that they were judged by a jury of more than the constitutionally requisite number."). *Trinidad* focused on the alternate's vote – it is the talisman of the constitutional showing.

The State's Reply focuses on the sentence preceding the above quoted from *Trinidad*: "In neither of the [defendants] cases was the alternate juror allowed to vote on the *ultimate verdict* in the case, at either stage of trial." *Id.* (emphasis added). The State's interpretation of this phrase restricts inquiry to a single issue: the number of jurors in the box when the verdict is received from the jury to the trial court. So long as that number is twelve, any harm preceding the receiving of the verdict by the trial court is cured or non-existent regardless of irregularity.

This is the construction given to the phrase by the Court of Appeals decision. *Becerra v. State*, No. 10-17-00143-CR, 2022 W.L. 1177391 at *10 (Tex. App. – Waco

April 20, 2022, pet. pending) (*Becerra III).* To take this holding to its logical conclusion, even if uncontroverted evidence establishes the alternate voted on the received verdict, but was removed seconds before delivering the verdict, a violation of Article V, Section 13 or Article 33.01 does not occur.

Review is necessary to decide whether the words "ultimate verdict" as used in *Trinidad* means inquiry is limited to the number of jurors in the box when the verdict is actually received on the record, and, if so, what circumstances, if any, would exist in post-conviction proceedings to show that verdict was tainted by a vote of more than required by the Texas Constitution and the Texas Code of Criminal Procedure.

The State Reply asserts review is unnecessary because no verdict had been received when the alternate was removed from the jury room after forty-six minutes of deliberations, and instruction to disregard the alternate's participation was given. "Thus, at the time of the alternate's removal, no verdict had been delivered, announced, or received by anyone." (State's Reply, pg. 6-7). However, *Trinidad's* focus is on the alternate's *vote* on the verdict, not the *delivery* of the verdict. ("As long as only the *twelve regular jurors voted on the verdicts* that the appellants received, it cannot be said that they were judged by a jury of more than the constitutionally requisite number.") *Trinidad* at 28. (emphasis added).

The instruction given after the alternate was removed was not curative when viewed with the extra-record petit juror affidavit. The deliberation and vote on guilt

had occurred before the alternate was removed. The petit juror affidavit attests the alternate was discovered when the bailiff collected the second note on the deadly weapon special issue and no revote occurred after removal. (DX 1 [MNT]; CR 43).

The instruction was defective. It did not affirmatively instruct the petit jury to restart deliberations without the alternate's voice. Although the petit jury was told to disregard the alternate's participation in deliberations, the petit jury was thereafter immediately instructed to "*simply resume* your deliberations without [the alternate] being present." (4 RR 43) (emphasis added). Taking this instruction at face value, the instruction informed the petit jury to resume their deliberations on what they were deliberating upon – the deadly weapon special issue – and not to revisit the verdict of guilt they as a deliberative body, a body that included the alternate, already decided.

Second Response to State's Reply

The State's Reply engages on harm issues not addressed by the Court of Appeals in *Becerra III* and should be analyzed after the preserved error asserted by Becerra is addressed

The State Reply engages on harm issues not addressed by the Court of Appeals. The State's Reply devotes many pages sifting the trial evidence. In contrast, Becerra has in this Court and in the Court of Appeals focused harm arguments on the vote of the alternate juror on guilt *and* the alternate's full participation in that deliberation (the alternate's voice and vote in the jury room).

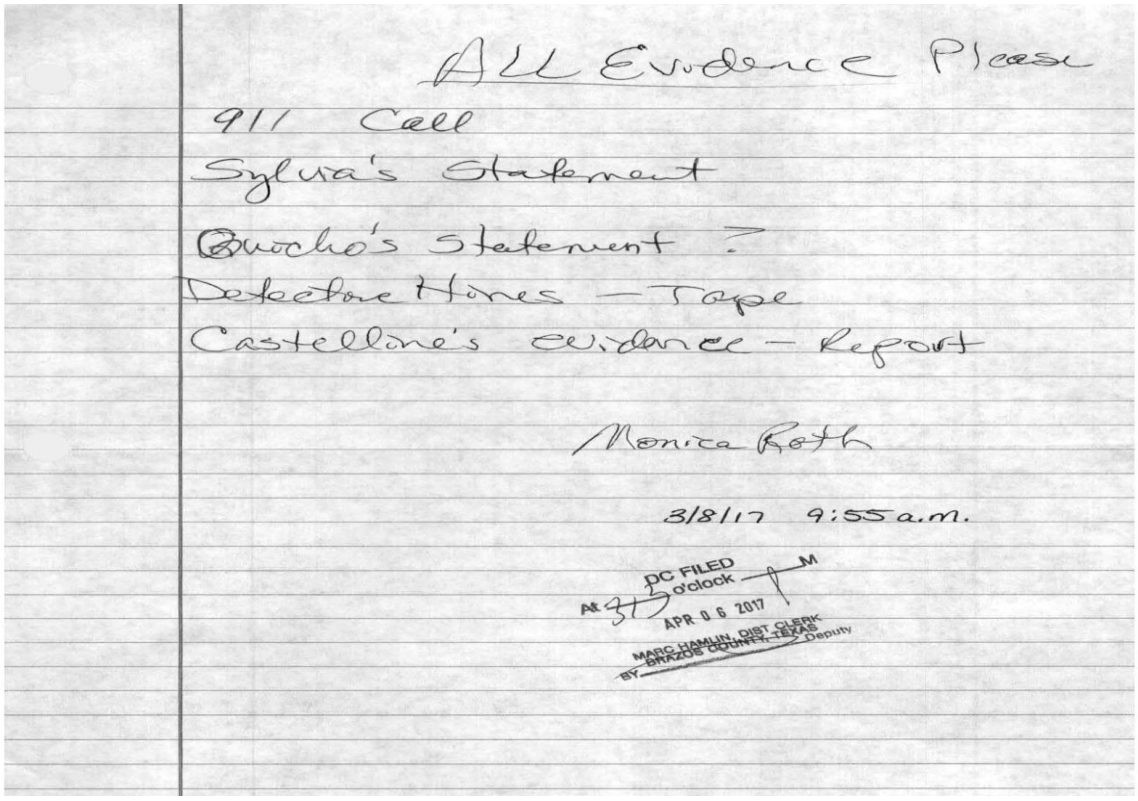
Becerra's briefing in the Court of Appeals followed *Trinidad's* error and harm directives: "The error in [Art. V, Section 13] cases, if any, in allowing the alternate to

be present with the regular jurors during deliberations is more usefully conceived as an error in allowing an outside influence to brought to bear on [defendant's] constitutionally composed twelve-member jury." *Id.* at 28. The outside influence in this case was the alternate deliberating and voting on guilt.

This language from *Trinidad* is yet another reason for a grant of review. Is harm analysis conducted under Rule 44.2(a) of the Texas Rules of Appellate Procedure or under the standard announced in *McQuarrie v. State*, an outside influence case decided two years after *Trinidad*? In *McQuarrie* this Court held the harm standard in cases involving outside influence is as follows: "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.' " 380 S.W.3d 145, 154 (Tex. Crim. App. 2012) (citing *Manley v. AmBase Corp.*, 337 F.3d 237, 252 (2nd Cir. 2003)).

To be complete, Becerra will briefly respond to the State's sifting of trial evidence. Evidence in the first phase of trial is contained in a single volume, concluded in a day, March 7, 2017. (3 RR). The first fifty-three pages of the jury trial evidence volume is 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 first phase trial evidence consisted of approximately one hundred and sixty-six pages.

The first jury note, time noted at 9:55 A.M. on March 8, 2017, supports the deliberating body consisting of the petit jury and alternate were focused on the unavailable evidence and witnesses – Sylvia Ramirez, Becerra's girlfriend (who did not testify), Salazar a/k/a "Guicho," (who did not testify), and a "tape" from Bryan Police Department Detective Travis Hines. The "tape" was likely a reference to the recorded statement Hines took from Sylvia Ramirez. The tape was not admitted as evidence, and Hines testimony about it was used by the State as collateral impeachment evidence of Michelle Becerra. (3 RR 83 [predicate]; 124-125 [collateral impeachment]). The first jury note is imaged below.




This jury note indicates the jury was focused on testimony not heard and evidence not admitted. Additionally, the length of the deliberation on guilt was not

short given the brevity of the trial evidence. Taken as a whole, the State cannot establish through the prism of the jury room either the intensity of deliberation or how many votes were taken on the verdict in the first phase of trial. Thus, the State's labeling of the evidence as "overwhelming" in their Reply is without support. (State's Reply, pg. 12). What is supported is the alternate participated in the deliberations, voted on the verdict, and deliberations were focused on disputed factual issues.

Two other arguments made in the State's Reply are here briefly addressed: First, the State points to the Trial Court's observation that if error occurred, that error did not "have an adverse effect on the guilty verdict returned by the other 12 individuals." (State's Reply, pg. 8 [5 RR 26]). This argument fails to disclose the Trial Court denied Becerra's Motion for New Trial based on a finding of waiver. (5 RR 26). ("I do find…that there was waiver"). This finding by the Trial Court was legal error according to this Court. *Becerra II* 620 S.W.3d at 249. The Trial Court harm finding could also be incorrect in either standard or application on appellate review following definitive decision by this Court on the law applicable to error and the proper harm standard to be applied.

Second, the State asserts Becerra argues structural harm. (State's Reply, pg. 10 ["Appellant claims that error itself is the harm."]). The most cursory of review of Becerra's briefing in the Court of Appeals on remand demonstrates harm arguments made solely under existing standards of constitutional and non-constitutional harm.

TEX. R. APP. PRO. 44.2(a) and (b) (Appellant's Court of Appeals Brief on Remand pgs. 9-13 [constitutional harm]; pgs. 15-17 [non-constitutional harm]).

The support for this assertion in the State's Reply is contained in a footnote and relies on an unofficial record YouTube website video from oral argument in the Court of Appeals. (State's Reply, pg. 10, fn. 2). Becerra's attempt to review that oral argument video revealed the YouTube video footnoted is no longer available. Regardless, Becerra does not and has not claimed structural harm applies – harm will be based on Rule 44.2(a) and/or (b), or the harm standard in *McQuarrie* when an outside influence on the jury is found to have been brought to bear on deliberations. *McQuarrie* at 380 S.W.3d at 524.

In sum, harm analysis has never been undertaken in this case due to the unsettled state of the law on error due to lack of construction of Article 33.011(b). This Court should grant review to undertake this construction. This Court should also determine what constitutes the meaning of "ultimate verdict" in *Trinidad*. Based on that determination, this Court may go further and determine what admissible record or extra-record evidence, if any, can taint that "ultimate verdict."

## PRAYER FOR RELIEF

The Court of Criminal Appeals should grant discretionary review, order oral argument and reverse the Court of Appeals and remand to the trial court for a new trial. Alternatively, this Court should reverse and remand to the Court of Appeals with instructions.

RESPECTFULLY SUBMITTED,

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

This Response to State's Reply to Petition for Discretionary Review complies with TEX. R. APP. PRO. 9.4(i)(2)(E) in that it contains 2,232 words, in Microsoft Word 2019, Garamond, 14 point.

*/s/ LANE D. THIBODEAUX*
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## CERTIFICATE OF SERVICE

I certify that a copy of this Response to State's Reply to Petition for Discretionary Review has been delivered *via* electronic filing on this the 21st day of June, 2022 to the following:

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