

**JURY CHARGE EGREGIOUS HARM BAD APPLICATION PARAGRAPH  
APPELLATE STUFF: JUDGES MEMORY WAY BETTER THAN A SILLY OLE  
REPORTER'S RECORD**

*Nava & Mendez*, NOS. PD-1283-12, PD15812-12, PD-1583-12, Keller, Cochran concurrence, Publish, 12-18-83. The application paragraph in the jury charge stated that conviction was authorized as a party if you find intent to commit “the offense” without specifying the offense was “murder”. This is important because there was more than one offense involved. In addition to the murder there was a theft. No objection lodged at trial, TCCA easily found no egregious harm. “The language of the application paragraph did not clearly direct the jury to deliberate in a way that is inconsistent with the law. “ There was also a conspiracy charge given which could help the jury understand what was meant to be proven. The law was argued correctly.<sup>[1]</sup> The jury could use common sense to figure out what the jury charge meant. (I am still trying to figure out how the non-lawyer jurors can catch and correct for errors in a charge when the 3-5 lawyers-one of whom is a Judge-involved in the case miss them). In a second and easily as astounding point, the TCCA addresses that part of the reporter’s record of voir dire which would show that error was preserved or not was missing. The Judge of the TCT testified (and the prosecutor) that she remembers this case and error was not preserved. This testimony was not countered by the defense so it is just as good as a record and the defendant does not get a new trial despite a mandatory statute to the contrary. TRAP 34.6(f) (3) which states that the defendant only gets a new trial if the missing portion of the transcript is necessary to the resolution of the appeal and the TCCA interprets that to mean if the Judge remembers that error is waived the part of the record that might show otherwise is not necessary to the appeal. Another scary point. Practice note: stuff the court and opposing counsel says on the record is evidence unless you contradict in the TCT. In this case appellate counsel did not try the case and had no personal knowledge<sup>[2]</sup>. This is a dicey proposition when it is the JUDGE providing testimony, with all due respect your honor you try so many cases isn’t possible that you do not remember this one? Do you have notes to reflect that?

**IAC FLIPS**

*Ex parte Daniel Villegas*, No. WR-78,260-01, Per Curiam, Price concurrence, Publish, 12-18-13, Kudos to Joe Spencer and John Mobbs for getting this kid’s conviction flipped on IAC grounds. Price’s concurrence which confuses me greatly states that it is not a *Schlup* writ because it is not a subsequent writ. Who cares due to some great lawyering this poor kid gets a new trial.

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<sup>[1]</sup> It scares me that the TCCA is now allowing jury argument to substitute for a jury charge that accurately sets forth the law and applies it to the facts in a case—especially since the jury is cautioned that what the parties argue is just that—argument.

<sup>[2]</sup> Why this office has a leg up by doing our own appeals—great accessibility to trial counsel!!

## **IAC TO NOT PUT ENOUGH PRESSURE ON CLIENT TO PLEA GUILTY WHEN THEY NEED TO PLEAD GUILTY**

*Ex parte Serena Staglin*, No. WR-77,485-01, Per Curiam, DNP, 12-18-13. Client was pleading guilty, did not say magic words to Judge who would not accept the plea. She got a good deal but said some things to the judge that were inconsistent with guilt. She never withdrew her problematic testimony, was re-indicted for cap murder and got life. Flipped on IAC grounds, counsel did not get her to withdraw her problematic testimony, she would have had he discussed it with her. *Janet's two cents: the client said she things that indicated to the court she was NOT GUILTY and the trial counsel was still found ineffective for not leaning on her to withdraw her testimony and plead cause it really was a great deal. Wow. I am seeing more and more convictions flipped on IAC ground on this basis. Best Advice: honestly document file very well as to advice you give client and why. I.E. told client that if she persisted in her testimony that she could not receive the plea deal she had wanted me to negotiate for her, that she needs to tell the truth, we cannot advise her to plead guilty if she is innocent, her choice not mine, she was there—I was not. Good luck on walking the tight rope between getting great deal, making sure plea is voluntary, not suborning perjury, and not testifying for your client.*

*Ex parte Henry Verdell Stevenson*, NOS. WR-79,907-01 and ER-79,907-02, IAC flip admonished to the wrong range of punishment by his lawyer. *Practice Note: you do not want to be this guy. Carry your code with you at all times and refer to it while talking to your client. This was a drug case and the Health and Safety code is a horrible rocky abyss do not assume that you have it memorized.*

*Ex parte William Virgil Hodges*, No. WR-76,096-01, per curiam dnp 12-18-13, Kudos from Nick Hughes of the Harris County Public Defender's Office for getting a conviction flipped by filing a motion for the court to reconsider an old and denied habeas on its own motion.

## **AND IT'S THE EVER POPULAR REMAND TO THE TCT TO MAKE A RECORD ON A WRIT**

**This section is included just to provide an overview of issues that the TCCA is finding could flip a conviction if a proper record is made**

- *Drug free zone case, street address in the surveyors report different from that in the police report. Further the report does not provide how the distance was calculated or how the measurements were taken—straight line or otherwise and what tool was used. What corner of the school tract is the boundary line of the school closest to the offense site. If you have a case involving a drug free zone do not take the police report's word for it, go out there. Measure.*
- *Improper cumulation order TPC3.03 offenses in the same criminal episode (with some exceptions clearly listed ) run concurrent not consecutive*
- *Not filing or even investigating an insanity defense. Note: that and not comping a client is a really common theme on IAC writs. Thank God for Bridget, Lorena and Lucy—true Rock Stars.*
- *Bad advice eligibility shock probation*
- *Failed to get free transcript that indigent defendant is entitled to. This is another really common one!*
- *Another failed to raise insanity as a defense*
- *Most intriguing of all. . . remand to determine if ineffective assistance of counsel for allowing the client to develop his own trial strategy.*