IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. PD-0549-17, PD-0550-17 & PD-0551-17

WILLIAM MARKS, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITIONS FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

When this Court came to say, as a matter of "first impression," what the law is with respect to Article 12.05(b) of the Texas Code of Criminal Procedure, it first set out what it acknowledged was the "literal text" of that provision:

> (b) The time during the pendency of an indictment, information or complaint shall not be computed in the period of limitations.

Hernandez v. State, 127 S.W.3d 768, 770 (Tex. Crim. App. 2004) (quoting TEX. CODE CRIM. PROC. art. 12.05(b)). We immediately conceded that, "[o]n its face, Article 12.05(b) does not require that subsequent indictments allege the same offense or even be based on the same

conduct." From these premises, one would have naturally expected the Court's next observation to be that the statute requires no interpretation on our part at all. Its literal meaning is quite plain from its face: The pendency of *any* indictment, information or complaint will toll the limitations period—without qualification.[1]

If the meaning of a statute is plain, then courts do not engage in "construction" of that statute; they simply implement that plain meaning. *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) ("Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.") (internal quotation marks and citations omitted). But not so with *Hernandez*. Instead of implementing what we all but admitted was the plain import of the statute on its face, we immediately jumped to a conclusion that something must be missing: "The Article provides no guidance as to how the indictments must be related to trigger the tolling provision." 127 S.W.3d at 770.[2] We did this despite the fact that there is nothing in the literal language of the statute to suggest that there must be any "relatedness" at all between one charging instrument and another already-pending charging instrument before

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[1] "[A]n indictment, information, or complaint" need only be pending to toll the limitations period—there is no other qualifying language in the provision. The word "an" is a variation of the indefinite article "a," which may mean "any" in context. WEBSTER'S II NEW COLLEGE DICTIONARY 1999, at 1. Nothing about the context in which it is used in Article 12.05(b) suggests it means anything else.

[2] Later, the Court would observe similarly that "we are faced with the task of rounding out the legislature's enactment of Article 12.05(b) because the legislature provided no guidance about how the prior and subsequent indictments should be related to toll the statute of limitations period." 127 S.W.3d at 771.

tolling of limitations may be triggered.

It is simple enough to implement the statute without imposing any notion of "relatedness" upon it, and there is no particular reason (at least none that emanates from the statutory language itself) to suppose that we ought to do so. The Court in *Hernandez* complained that "*Boykin* does not tell us what to do when the legislature leaves a gap and provides no guidance about how to apply a statute." 127 S.W.3d at 771. The Court then proceeded to fill its perceived "gap" in the statute "[b]ased on our review of the public policy implications[.]" *Id*. at 774. But there was no such "gap" in Article 12.05(b). The Court may have found it difficult, as a matter of policy, to stomach the breadth of the statutory language on its face, but that did not create a vacuum for the Court to rush in and fill. What *Boykin* tells us to do with a plain statute is to take it at its literal word, come what may.[3]

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[3] The Court in *Hernandez* suggested, without explicitly holding, that to afford the statute its admittedly plain meaning would result in an absurdity—presumably to justify its intervention to construe the statute notwithstanding its plain import, as authorized by *Boykin*. *See* 818 S.W.2d at 785 (holding that, where plain meaning leads to absurd consequences, a court may deviate). We said:

> If we were to read "an indictment" to mean *any* indictment for *any* unrelated offense, then a person could be continually indicted for any offense that the State felt inclined to charge once an initial indictment was filed. This application would defeat the purpose of the statute of limitations, which requires the State to exercise due diligence in obtaining and presenting a formal accusation of an offense against a person.

Hernandez, 127 S.W.3d at 772. This constituted a substantial exaggeration. Any offender who has never before been formally charged would still enjoy the benefit of the legislative grace of the statutory deadlines for filing formal criminal charges embodied in Chapter 12 of the Code of Criminal Procedure. *See Ex parte Matthews*, 933 S.W.2d 134, 136 (Tex. Crim. App. 1996), *overruled on other grounds by Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998) ("Statutes of limitation are acts of grace in that the sovereign surrenders its right to prosecute[.]"). Statutes of limitations do not reflect fundamental rights:"Indeed, at common law there was no limitation as to

We have reiterated since *Boykin* that the "seminal rule of statutory construction is to presume that the legislature meant what it said." *State v. Vasilas*, 187 S.W.3d 486, 489 (Tex. Crim. App. 2006). Moreover, "we interpret the Legislature's statutes, not its intentions." *Getts v. State*, 155 S.W.3d 153, 158 (Tex. Crim. App. 2005). "In adhering to this rule, we show our respect for the legislature and recognize that if it enacted into law something different from what it intended, it would amend the statute to conform to its intent." *Vasilas*, 187 S.W.3d at 489.

It is beyond the scope of the Court's proper authority to "rescue" the Legislature from what we perceive to be "its drafting errors, and to provide for what we might think . . . is the preferred result." *Getts*, 155 S.W.3d at 158 & n.11 (citing *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004)). *See also* TEX. CONST. art. II (separation of powers); *Boykin*, 818 S.W.3d at 786 & n.4 (when courts stray beyond the plain language of a statute, they inappropriately invade "the lawmaking province of the Legislature"). This case powerfully illustrates why we should resist all temptations to overlook that limitation. The Court in *Hernandez* obviously preferred as a matter of policy that two charging instruments should somehow be "related" to each other before one that is pending may serve to toll the limitations period for an offense charged in another. The plain reach of the statute's tolling provision is far greater, however, and there is no source in the statutory language to justify

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the time within which offenses could be prosecuted." *Proctor v. State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998). There is nothing inherently absurd about the Legislature's decision to extend the scope of its largesse only to those offenders who have no other current formal charges pending.

implementation of the Court's limiting policy preference.

Nonetheless, today the Court finds itself engaging in a debate regarding the proper construction of language that the Court itself adopted in *Hernandez* to fill a perceived policy "gap." The question it wrestles with is: What does it mean to say that a pending indictment and a subsequent indictment "allege the same . . . transaction"? 127 S.W.3d at 774. The Court thus struggles to construe, not the language of the statute itself, but instead a court-generated phrase that we ourselves plugged into a statute that needed no "construction" to begin with.

The competing opinions today can agree on no particular definition of "same transaction"—a phrase we have found elusive in other contexts. *E.g.*, *Rubino v. Lynaugh*, 770 S.W.2d 802, 803–05 (Tex. Crim. App. 1989) (noting the inconsistent applications of a "continuous act or transaction" standard for applying the defunct "carving doctrine" for double jeopardy purposes). They simply arrive at different intuitive destinations, without providing much that is useful to facilitate future application of the statutory scheme. Rather than take a side in this debate, I would revisit *Hernandez*, acknowledging that it was wrong at its inception, it is not proving particularly workable, and it should be overruled. *See Proctor v. State*, 967 S.W.2d 840, 845 (Tex. Crim. App. 1998) ("[W]hen governing decisions of this Court are unworkable or badly reasoned, we are not constrained to follow precedent.").

Applying the plain language of the statute, I would hold that the pending indictment

in this case served to toll the limitations period. On that basis I agree with Judge Keasler. Appellant was not harmed by the amendments to the existing indictments. Therefore, like Judge Keasler, I respectfully dissent.

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