CAUSE NO. 01-24-00166-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

KENTRELL OBRIEN BRUMFIELD
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Nos. 1776751
From the 230th Judicial District Court of Harris County, Texas

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APPELLANT'S BRIEF

Oral Argument Requested

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STATEMENT OF THE CASE

On June 29, 2022, Kentrell Brumfield was charged with the murder of Brittani Simmons in the 230th District Court of Harris County, Texas. (C.R. at 9-10). On August 17, 2023, Kentrell Brumfield was formally indicted. (C.R. at 42). Though Kentrell Brumfield requested to proceed *pro se* on multiple occasions, the request was not granted until February 15, 2024. (C.R. at 272-273). Kentrell Brumfield's jury trial began on February 16, 2024 and concluded on February 21, 2024. (C.R at 385-386). Kentrell Brumfield was convicted of murder and sentenced to life in prison. (C.R. at 300-302). Kentrell Brumfield filed a timely notice of appeal immediately after his conviction. (C.R. at 305). Kentrell Brumfield timely filed a motion for new trial that sets forth the basis for the claims raised in this appeal. (C.R. at 346-360). The motion for new trial was denied after an evidentiary hearing. (C.R. at 387).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested in this case. There is a relatively little controlling authority that guides Courts in resolving issues involving *pro se* litigants, particularly regarding the issues arising out of Articles 1.051(e) and 39.14(d) of the Code of Criminal Procedure. Argument may be helpful to permit the

parties to address the nuances of these laws as well as any of this Court's concerns or questions about the parties' positions.

ISSUES PRESENTED

Issue One, Parts A and B: In violation of the right to due process and Article 1.051(e), Kentrell Brumfield was deprived of the required 10 days' notice between the *Faretta* hearing and start of the jury trial in his case

Issue Two, Parts A and B: In violation of the right to due process and Article 39.14(d), Kentrell Brumfield was not provided access to significant portions of the discovery in this case

SUMMARY OF THE ARGUMENT

Issue One, Parts A and B

The Court granted Kentrell Brumfield's request to proceed *pro se* on February 15, 2024 and began trial proceedings in this case only one day later on February 16, 2024. Failure to provide 10 days' notice violates Article 1.051(e) of the Code of Criminal Procedure and failure to provide adequate time to prepare a defense violates the right to due process. Kentrell Brumfield's rights and privileges as a *pro se* litigant only came into being on February 15, 2024. However, Kentrell Brumfield's dissatisfaction with his trial attorney and attempts to fire his trial attorney long predated February 15,

2024. As Kentrell Brumfield was represented by counsel until February 15, 2024, he did not have an independent ability to raise his request to proceed *pro se* to the judge and is blameless in the Court's delay in conducting a *Faretta* hearing in this case. The significant harm this rush to trial caused to Kentrell Brumfield's defense warrants this case be remanded for a new trial.

Issue Two, Parts A and B

Due to several concurrent factors, Kentrell Brumfield was provided access to only a small subset of the available discovery relevant to his case. Consequently, Kentrell Brumfield's rights under Article 39.14(d) were impaired. Given the magnitude of the impingement upon Kentrell Brumfield's discovery rights, the impairment of Kentrell Brumfield's ability to access the discovery in his case as a *pro se* litigant has due process implications. A represented party's ability to access evidence as mediated through their attorney or investigators is not equivalent to the ability to independently review evidence as a *pro se* litigant. As a litigant should not be required to remember all important details of the pieces of evidence reviewed at some unspecified time in the past, Kentrell Brumfield's discovery rights were impaired, his substantial rights and constitutional rights were violated, and this case should be remanded for a new trial.

STATEMENT OF FACTS

On June 3, 2020, before the events of this case, Kentrell Brumfield and Lioneicia Malveaux broke up. (8 R.R. at 139). While Lioneicia Malveaux viewed the relationship as over and wanted to move on, Kentrell Brumfield did not. (State's Ex. 29). One the night of June 29, 2020, Kentrell Brumfield contacted Lioneicia Malveaux with the intent of rekindling their relationship, however Lioneicia Malveaux made it clear the relationship was over. (State's Ex. 29). To that end, Lioneicia Malveaux placed Kentrell Brumfield's property in a box, set it outside her house, and told Kentrell Brumfield to pick up the property and leave her alone. (9 R.R. at 78, 149).

A little after 9:00 PM on June 29, 2020, Lioneicia Malveaux and her next-door neighbor Brittani Simmons were cooking together inside Lioneicia Malveaux's apartment. (9 R.R. at 151). Kentrell Brumfield arrived at the apartment to confront Lioneicia Malveaux. (8 R.R. at 153). According to Kentrell Brumfield, he realized was set up when he arrived at the complex - armed men were waiting outside, waiting to ambush him. (8 R.R. at 31; 8 R.R. at 190-192). According to Lioneicia Malveaux, Kentrell Brumfield forced his way inside her apartment. (8 R.R. at 153-154). Kentrell Brumfield broke a surveillance camera inside Lioneicia Malveaux's house, locked the door,

cocked his gun, told Brittani Simmons to sit on the couch with Lionecia Malveaux, and started pacing. (8 R.R. at 194). Claiming that Brittani Simmons came at him with something in her hand, Kentrell Brumfield shot and killed Brittani Simmons and shot Lioneicia Malveaux several times. (8 R.R. at 157-159; 194-195).

ARGUMENT

Issue One, Parts A and B: In violation of the right to due process and Article 1.051(e), Kentrell Brumfield was deprived of the required 10 days' notice between the *Faretta* hearing and start of the jury trial in his case

A. Relevant facts and preservation of error

This Court conducted a *Faretta* hearing in this case on February 15, 2024. (C.R. at 384). On February 16, 2024, only one day later, jury selection began. (C.R. at 384). On February 19, 2024, only 4 days after being permitted to proceed *pro se*, a jury was sworn in, and testimony began in Cause 1776751. (C.R. at 384). No waiver of the 10-days' notice was obtained in the case. To the contrary, Kentrell Brumfield expressed his frustration with how the imminent trial date made it impossible to prepare for trial. (8 R.R. at 13). Kentrell Brumfield filed a motion for new trial complaining that he had been denied the 10 days' notice under required Article 1.051(e) and his due process rights to prepare for trial had been violated. (C.R. at 347-348).

B. Relevant law

1. Issue One, Part A: Statutory rights may be protected by the right to due process

The denial of a statutory right may constitute a due process violation. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (due process requires procedural protections when the loss of a governmental benefit or right would condemn an individual to suffer a grievous loss). *See also Maddux v. State*, 545 S.W.2d 459, 460 (Tex. Crim. App. 1976) (penalizing the exercise of a statutory right to appeal constitutes a due process violation); *Ard v. State*, 191 S.W.3d 342, 344 (Tex. App.—Waco 2006, pet. ref'd) (the statutory right to counsel on a Chapter 64 motion has due process implications); *Woody v. State*, No. 05-95-00673-CR at *18 (Tex. App.—Dallas Dec. 31, 1996, no writ) (mem. op., not designated for publication) (holding that the statutory right to jury punishment was protected by due process).

2. Issue One, Part B: Article 1.051(e)'s 10 days' notice provision

> […] If an indigent defendant who has refused appointed counsel in order to retain private counsel appears without counsel after having been given an opportunity to retain counsel, the court, after giving the defendant a reasonable opportunity to request appointment of counsel or, if the defendant elects not to request appointment of counsel, after obtaining a waiver of the right to counsel pursuant to Subsections (f) and (g), may proceed with the matter on 10 days' notice to the defendant of a dispositive setting.

TEX. CODE CRIM. PROC., art. 1.051(e).

C. Argument

1. Issue One, Part A: The right to due process encompasses the right to have adequate time to prepare for trial

The right to prepare for trial is protected by the Fourteenth Amendment. *Hawk v. Olson*, 326 U.S. 271, 274 (1945). This right encompasses the opportunity to examine the charge, subpoena witnesses, and prepare a defense. In the post-Michael Morton act world, the duty to prepare for trial almost invariably encompasses identifying and flagging video and audio clips for use at trial; breaking down offense reports by witness, action, and statement; combing through expert reports for helpful information; and identifying and subpoenaing the witnesses needed to introduce that information. These tasks take a significant amount of time and attention and generally can only be performed with hands-on access to the discovery materials in the case and/or the help of investigators and experts. The utility and impact of evidence is not always immediately evident. Particularly important or voluminous evidence may require multiple rounds of review to ensure all critical details are accounted for and can be presented in a trial-ready format.

By requiring Kentrell Brumfield to begin picking a jury one day after being permitted to proceed *pro se*, the Court deprived Kentrell Brumfield of an opportunity to summon any witnesses on his behalf, research and file any

motions, or review any of the video or audio evidence in the case. Furthermore, the did not permit Kentrell Brumfield sufficient time to review all the evidence, much less marshal the facts into a cohesive narrative. Beyond the minimal constitutional guarantee of the right to prepare for trial enshrined by the right to due process, accused citizens who are represented by appointed counsel or who represent themselves *pro se* are entitled to at least ten days to prepare for trial. TEX. CODE CRIM. PROC., art. 1.051(e). This government-created procedure protects litigants from being unfairly convicted, is protected by due process, and must be applied equally to all eligible litigants. *Morrissey v. Brewer*, 408 U.S. at 481; *see also Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The constricted timeline in this case violated Kentrell Brumfield's due process rights to prepare for trial and deprived him of the constitutionally-protected statutory rights other litigants in his shoes would be afforded.

2. Issue One, Part B: The plain text of Article 1.051(e) requires 10 days' notice between the waivers required by 1.051(f) and 1.051(g) and a dispositive setting in the case

By its own plain meaning, Article 1.051(e) requires 10 days' notice between the time the Court permits the accused to waive counsel and the subsequent dispositive setting: "the court, […], if the defendant elects not to

request appointment of counsel, after obtaining a waiver of the right to counsel pursuant to Subsections (f) and (g), may proceed with the matter on 10 days' notice to the defendant of a dispositive setting." TEX. CODE CRIM. PROC., art. 1.051(e). In this case, it is not disputed that only one day elapsed between the date Kentrell Brumfield was granted leave to proceed *pro se* and the date that Kentrel Brumfield began picking a jury in the case.

Where the plain meaning of a statute is apparent from the statutory text, it should be given effect: "[i]n construing a statute, we give effect to the plain meaning of its language, unless the statute is ambiguous or the plain meaning would lead to absurd results that the legislature could not have possibly intended." *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). Where an interpretation would lead to absurd and likely unconstitutional results, it should be avoided. *See Muniz v. State*, 851 S.W.2d 238, 244 (Tex. Crim. App. 1993) (ambiguous statutes should be construed in a way that avoids absurd, unintended results); *See Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979) (statutes should be construed in a way that upholds their constitutionality).

Interpreting Article 1.051(e) according to its plain meaning is rational and straightforward. The 10 days' notice requirement applies in several

circumstances: when "a nonindigent defendant appears without counsel at a proceeding after having been given a reasonable opportunity to retain counsel", when an "indigent defendant who has refused appointed counsel in order to retain private counsel appears without counsel after having been given an opportunity to retain counsel", and when a "defendant elects not to request appointment of counsel" and a written waiver of counsel is obtained from the defendant. TEX. CODE CRIM. PROC., art. 1.051(e). There is nothing absurd about ensuring a person who will proceed *pro se* understands the gravity of their decision, has time to prepare for trial, and has a timeline to make decisions related to the appointment/hiring of counsel. Nor is there anything absurd about differentiating between a person who proceeds *pro se* (and who is entitled to 10 days' notice) from a person who is already represented by counsel of their own choosing and who requests a last-minute substitution of counsel. In the latter scenario, the defendant has all the benefits that attach with representation by counsel of their choosing throughout the trial proceedings and merely wishes to "jump horses" at a late stage in the case.

i. A different interpretation of Article 1.051(e) would absurdly and unconstitutionally deprive a *pro se* litigant of any meaningful ability to vindicate the "right to defend" guaranteed by the Bill of Rights

The accused is never entitled to hybrid representation. *McKinny v. State*, 76 S.W.3d 463, 478 (Tex. App.—Houston [1st Dist.] 2002, no pet.). One important consequence of this rule is that the accused who is represented by counsel has no independent ability to trigger the right to compulsory process, has no right to conduct direct review any discovery in the case,[1] and has no ability to obtain a ruling on a *pro se* motion filed with the Court. *See Busselman v. State*, 713 S.W.2d 711, 714 (Tex. App.—Houston [1st Dist.] 1986, no writ) ("However, when, as here, the court denies relief to a defendant who has no right to present his motions, we will not find the denial to be reversible error"). This means that a person who seeks leave to proceed *pro se* is still subject to the whims and strategic decisions of an attorney the person may fundamentally disagree with until the Court grants that person's request. As happened here, if a *pro se* litigant is not provided any time between a dispositive setting and a *Faretta hearing* granting that litigant leave to proceed *pro se*, the litigant will never have any opportunity to exercise any of his meaningful pretrial powers as a *pro se* litigant. Yet, *Faretta* requires that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fail." *Faretta v. California*, 422 U.S. 806, 819-20

[1] *See e.g.* TEX. CODE CRIM. PROC., art. 39.14(a)

(1975). To allow for Courts to permit the trial immediately after a litigant is provided leave to proceed *pro se* would be inconsistent with the framework set forth in Article 1.051(e) and would place the accused in an untenable situation, leading to absurd, unconstitutional results. Essentially, the accused must sacrifice their due process rights to prepare for trial in exchange for the right to proceed *pro se*. *C.f. Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (the government cannot force a person to sacrifice one constitutional right to exercise another, unrelated constitutional right). The accused must have time to craft and enact their own defensive strategy.

ii. An alternate interpretation of Article 1.051(e) empowers the Court to determine the timeframe of hearing a request to proceed *pro se*, then to penalize the accused if that timeframe affords insufficient time to prepare for trial

While the obvious consequence of the denial of the accused's right to hybrid representation is the denial of any ability to conduct litigation in the case, it also denies the accused to ability to request an audience with the Court to request leave to proceed *pro se*. Particularly in a county like Harris County, where for the majority of court settings the citizen accused will be kept in the "holdover" outside the courtroom, the accused has limited access to the Court. *See e.g. Hinton v. State*, No. 01-93-00055-CR (Tex. App.—Houston [1st Dist.]

Apr. 7, 1994, pet. ref'd) (mem. op., not designated for publication); *Nguyen v. State*, No. 14-11-00292-CR, 2012 Tex. App. LEXIS 5556, at *11 (Tex. App.—Houston [14th Dist.] July 12, 2012, pet. ref'd) (mem. op., not designated for publication) (mentioning the holdover where Harris County detainees are kept). Besides filing motions that the Court is not required to consider, there is no opportunity for the accused to independently seek a hearing on their request to proceed *pro se*.

The Court does not have to act on the request to proceed *pro se* unless the accused's attorney brings the matter to the attention of the Court and requests a ruling. *Busselman*, 713 S.W.2d at 714. Even when the Court is aware, as was the case here, that there are simmering tensions between an attorney and a client, the Court may simply continue exhort the accused to continue working with defense counsel and fail to address the problem until the eve of trial. (2 R.R. at 4); (3 R.R. at 6, 16); (5 R.R. at 3); (C.R. at 67); (C.R. at 98); (C.R. at 118); (C.R. at 121); (C.R. at 161-162); (C.R. at 187-190).

As demonstrated here, the right to proceed *pro se* is not a self-executing right. An interpretation of Article 1.051(e) that permits a Court to determine when to conduct a *Faretta* hearing occurs, then penalizes the accused when that hearing is conducted a day before trial, is fundamentally unfair. Kentrell

Brumfield made several attempts to raise his concerns with his attorney and resignation that he needed to proceed *pro se* to the Court – however, ultimately, he had no power to request a ruling or an audience for his requests for leave to proceed *pro se*.

3. Kentrell Brumfield does not have "unclean hands," did not wait to the last minute to request the ability to proceed *pro se*, and cannot be punished for the delay in this case

Though the State had opportunity to offer evidence suggesting that Kentrell Brumfield improperly requested to proceed *pro se* on the eve of trial, the State could not and did not make any such showing. There is no evidence that Kentrell Brumfield's request to proceed *pro se* was an attempt to cause delay or exert some form of inappropriate leverage or control over the legal proceedings in his case. To the contrary, Kentrell Brumfield told a consistent story through letters, motions, and testimony, of having an estranged relationship with his attorney, who he believed was not investigating the case and spending enough time communicating with him about the case. (2 R.R. at 4); (3 R.R. at 6, 16); (5 R.R. at 3); (C.R. at 67); (C.R. at 98); (C.R. at 118); (C.R. at 121); (C.R. at 161-162); (C.R. at 187-190). These concerns were first expressed on the record on July 26, 2023 and were next addressed on the record 8 days before trial. (2 R.R. at 4); (3 R.R. at 9-16).

It should be noted that Kentrell Brumfield was not granted permission to proceed with hybrid counsel, and was at trial counsel and the trial court's mercy as to which opportunities, if any, Kentrell Brumfield was afforded to raise the issue of his dissatisfaction with trial counsel before the Court. As Kentrell Brumfield did not have the authority to request an audience with the Court, it cannot be said that the Court was presented with "an eleventh-hour request for change of counsel" in this case. *C.f. Burgess v. State*, 816 S.W.2d 424, 428 (Tex. Crim. App. 1991).

D. Harm

While error related to Article 1.051(e) is reviewed for injury to a person's substantial rights and a violation of the right to due process is reviewed for harmful error, it is not entirely clear what that review looks like in the wake of *Cain v. State*[2]:

> Except for certain federal constitutional errors labeled by the United States Supreme Court as "structural," no error, whether it relates to jurisdiction, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis. Of course, where the error involved defies analysis by harmless error standards or the data is insufficient to conduct a meaningful harmless error analysis, then the error will not be proven harmless [under the applicable harmless-error test]. Hence, it may be true that some kinds of errors (particularly

[2] *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (holding that all errors, except certain federal constitutional errors labeled as "structural" by the United States Supreme Court, are subject to a harm analysis).

> jurisdictional ones) will never be harmless under the [applicable] test and that some other kinds of errors will rarely be harmless.

Mendez v. State, 138 S.W.3d 334, 339-40 (Tex. Crim. App. 2004). While this Court has the considered issue of harm analysis for a 1.051(e) violation before, it has not fully described the analysis that must be performed:

> However, this error is subject to a harm analysis. We conclude, on the basis of the record, that the trial court violated the Code of Criminal Procedure by giving Duer nine days--instead of 10--to prepare. We cannot say, however, that one additional day would have affected appellant's defense or the outcome of the sentencing hearing. See TEX. R. APP. P. 44.3(b). We conclude that the error was harmless.

Rivera v. State, 123 S.W.3d 21, 32 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Precisely because issues related to trial preparation can be difficult to reconstruct and analyze in a way that is typical of harmless error review under Rule 44.2(b), this Court should conclude that the errors cannot be proven harmless. *Id.*

Kentrell Brumfield's defense was impaired in three important ways. Kentrell Brumfield had artificially limited access to discovery in the case, had insufficient time to conduct any independent investigation or issue compulsory process in the case, and was impaired in his ability to organize a defense. Together, these issues rendered Kentrell Brumfield's trial a futile exercise before it started:

> THE DEFENDANT: A lot of things have been missing. I'm sorry. I don't even know -- don't want to cause no conflict or nothing. But I'm just saying, like, this the things that was going on that wasn't brought to your attention. There were different things that were bought to my attention that it wasn't beneficial for me to -- to have the evidence I need. I'm not no lawyer. I'm not no -- I'm not no investigator to go out to do these things. And then it's one other thing. […]
>
> But then you don't know what I'm here for. The reason -- they don't know why I'm here. I've got paperwork I've been filing. Then I -- none of it never got – […] None of it ever got acknowledged. […]
>
> But I -- I seen -- I seen five months without even going to court and not hearing from nobody. Two weeks, it's time to go to trial. I got to take this plea or do this or do that. No, that ain't -- no, that's not -- not happening. That's like -- that ain't -- that ain't how it's supposed to go.

(8 R.R. at 12-14).

> THE DEFENDANT: Again, my evidence was left out. The evidence that y'all seen and the audio that I seen and heard, I watched with y'all.
>
> Just like I asked the doctor, how many times she was shot and what gun it came from, no evidence. She couldn't even answer that and she's a doctor.
>
> My thing is, like I -- I said it even before they even picked y'all, whoever they pick, I'm -- I'm not going to be mad. I just want -- I just wanted this to be fair.
>
> It's like I couldn't even get out what I need to get out because I'm -- I'm sitting here and take it.

(9 R.R. at 62 – 63).

1. **Kentrell Brumfield was harmed by limited access to discovery**

Kentrell Brumfield was provided a limited subset of the discovery in the case and was not permitted to inspect the videos, listen to the audio, and did not receive access to many of the other discovery materials in the case as a matter of "policy." *See* (8 R.R. at 7); (12 R.R. at 14-16); (Defendant's Exhibits 1, 2, 3, 4, 5). Kentrell Brumfield did not have the ability to inspect critical evidence, including the phone call recordings with Delicia Malveaux, the 911 call evidence, the firearms report, and bodycam video from the scene as a *pro se* litigant. (State's Exhibits 1, 4, 30, 38). Brumfield was not provided a copy of the clerk's record in the case, and it's not clear how he could have presented or sought ruling on the numerous requests and motions filed in the case. (12 R.R. at 38); (C.R. at 60-61, 63-65, 69-84, 89-91, 93-96, 105-107, 134-135, 136-137, 139-140, 141-142, 145-146, 151-152, 155-156, 157-158, 164-167, 169-171). Inasmuch as the State claimed at the motion for new trial hearing that trial counsel and his investigators played video and audio evidence to Kentrell Brumfield, just as an attorney is entitled to a transcript of a proceeding and is not required to rely their recollection of that proceeding, having past access to the video and audio in the case is a poor and constitutionally infirm substitute to discovery review:

> While trial notes might well provide an adequate substitute for a transcript, the failure to make such notes does not bar an indigent

> prisoner from claiming the right to a free transcript, *Eskridge*, *supra*, at 215. As for requiring a prisoner to rely on his memory, this Court rejected that as an alternative to a transcript in *Gardner*, *supra*, at 369-370, and *Williams*, *supra*, at 459. Indeed, in *Long* we refused to consider any alternatives suggested by the State, on the ground that in that case a transcript was in fact available and could easily have been furnished.

Britt v. North Carolina, 404 U.S. 226, 229 n.4 (1971).

2. Kentrell Brumfield was harmed by being deprived of any ability to conduct investigation or exercise compulsory process

It was clear throughout the trial that Kentrell Brumfield was not satisfied with the investigation performed or records obtained by the defense in this case. (8 R.R. at 9; 14; 190; 206); (9 R.R. at 48); (12 R.R. at 17); (Defense Exhibit 1). If afforded sufficient time, Kentrell Brumfield would have had an opportunity to issue subpoenas for surveillance video from the Hollow Tree Apartment Complex (12 R.R. at 17-18). The issue of the surveillance video kept coming up during the proceedings in this case – and even if the surveillance video in the case never or no longer existed, Kentrell Brumfield could have obtained admissible evidence that there were no existing surveillance records in the case. (8 R.R. at 9; 14; 190; 206); (9 R.R. at 48); (12 R.R. at 17); (Defense Exhibit 1). Kentrell Brumfield would have had the ability to secure the attendance of Maleah Stafford (who had been subpoenaed as a witness) and Laquasha Brumfield, the only two witnesses Kentrell Brumfield

called in the case. (9 R.R. at 38; 52). Kentrell Brumfield could have obtained the firearms report, which provides some level of support to his theory that multiple shooters could have been involved in the death of Brittani Simons (Defense Exhibit 7).

3. Kentrell Brumfield was harmed by having insufficient time to plan a defense strategy

Had Kentrell Brumfield been afforded 10 days' notice, Kentrell Brumfield would have had a more reasonable opportunity to become personally acquainted with the substantial amount of discovery in the case. (Defense Exhibit 3). Kentrell Brumfield did not have enough time to even identify which documents he had not been provided in the case, much less organize his thoughts for trial. (8 R.R. at 8). The impact of the short timeline was also evident during Kentrell Brumfield's direct examination – Kentrell Brumfield had no cohesive theory of the case and was not able to formulate a series of questions and answers on the spot. (9 R.R. at 45).

4. Under either the harmless error standard of review or error affecting substantial rights standard of review, Kentrell Brumfield was harmed in this case

Having impacted Kentrell Brumfield's right to review discovery, conduct any follow-up investigation, issue subpoenas, and to plan a trial strategy based

on the evidence in the case,[3] Kentrel Brumfield was harmed and impaired in his ability to defend himself at trial. The right to conduct discovery (protected by the due process right to fair trial as well as the due process right to statutorily-permitted discovery), the ability to issue subpoenas (protected by the right to compulsory process), and the right to prepare for trial (protected by the right to due process) are the cornerstone of a person's defense and are substantial rights. Kentrell Brumfield has demonstrated that these rights were impacted by the rush to trial in this case. (8 R.R. 7-19) (Def. Ex. 1). The State made no showing that Kentrell Brumfield had a meaningful opportunity to review all the critical pieces of evidence while preparing for trial nor any evidence that his review of the critical pieces of evidence occurred recently, that Kentrell Brumfield could have secured the attendance of any witness in the one day before trial, or had an opportunity to plan a defense. By curtailing or effectively denying these rights, Kentrell Brumfield was forced to trial when

[3] During the Motion for New Trial Hearing, Kentrell Brumfield's former trial counsel claimed that "But once again, when the investigator and I are preparing a case for trial, we get evidence from a multitude of different sources." (12 R.R. at 37). There were no notes or evidence not part of the District Attorney's discovery in the case provided by former trial counsel or the investigator in the case that were included on the USB Drive. (Def. Ex. 5).

he was not ready to proceed. (8 R.R. 7-19) (Def. Ex. 1).[4] Even should this Court conclude that Kentrell Brumfield's substantial rights were not injured, this Court should conclude that there was some harm to Kentrell Brumfield's trial.

Issue Two, Parts A and B: In violation of the right to due process and Article 39.14(d), Kentrell Brumfield was not provided access to significant portions of the discovery in this case

A. Relevant facts and preservation of error

On February 15, 2024, Kentrell Brumfield was granted leave to proceed *pro se* (C.R. at 384). At this time, Kentrell Brumfield acquired the right to personally inspect the discovery in his case. TEX. CODE CRIM. PROC., art. 39.14(d). While Kentrell Brumfield was provided with printouts of several pieces of evidence, much of the discovery in the case was never made available to Kentrell Brumfield. (12 R.R. at 36); (Defense Exhibits 1, 3, 4). Kentrell Brumfield realized that his access to discovery was limited and brought the issue to the attention of the Court:

> THE DEFENDANT: A lot of things have been missing. I'm sorry. I don't even know -- don't want to cause no conflict or nothing. But I'm just saying, like, this the things that was going on that wasn't brought to your attention. There were different things that were

[4] *C.f. Maldonado v. State*, No. 03-12-00725-CR, 2015 Tex. App. LEXIS 1543, at *16-17 (Tex. App.—Austin Feb. 19, 2015, no pet.) (mem. op., not designated for publication) (Where the accused did not make any record that the lack of 10 days' notice impacted the ability to prepare for trial, the nature of the proceeding was less complex than a trial, and the accused pled true in a revocation hearing, no harm.)

> bought to my attention that it wasn't beneficial for me to -- to have the evidence I need. I'm not no lawyer. I'm not no -- I'm not no investigator to go out to do these things.

(8 C.R. at 12-13).

> THE DEFENDANT: Yes, sir. I -- I sent the motions that -- you know, that I sent it to you and the DA and to whoever I need to sent them to. None of them got granted.
>
> So at this moment, I would just – I would just want all the evidence. That's what I want.
>
> THE COURT: You have all of the State's evidence in front of you.
>
> Is there any motions that you would like me to look at that you filed at any time at this time?[5]
>
> THE DEFENDANT: I've been -- I've been -- well, I got -- that's what I wanted.
>
> THE COURT: Anything?

(8 R.R. at 17-18). Rather than investigate the matter or ensure Kentrell Brumfield an opportunity to review the State's evidence, the Court began proceedings in the case. (8 R.R. at 18) (Def. Ex. 4).

There were three independent problems that lead obstructed Kentrell Brumfield's right to meaningful discovery. First, while typically *pro se* litigants are provided a computer and permitted to review discovery in Court, Kentrell

[5] Kentrell Brumfield did not have a copy of the Clerk's record in the case and it is not clear how we would have been able to argue any of the pending motions before the Court.

Brumfield was not. (12 R.R. at 12-16); (Defense Exhibit 1). Second, Harris County Sheriff's Office policy prevented Kentrell Brumfield from obtaining access to the USB drive that trial counsel furnished to Kentrell Brumfield after withdrawing from the case. (Defense Exhibit 2). Third, a substantial portion of the evidence that was available to Kentrell Brumfield on the District Attorney's Portal was neither printed out or included on the USB drive that trial counsel provided. (Defense Exhibit 4).

Kentrell Brumfield did not obtain the ability to inspect any of the audio or video evidence in the case, including the 911 calls, the phone call recording between Kentrell Brumfield and Delicia Malveaux, any bodycam or crime scene videos, calls between Yolanda Dennis and the district attorney's office, or the interrogation evidence (Def. Ex. 4). Furthermore, Kentrell Brumfield did not obtain access to the firearms report, medical records, 911 call detail records, witness meeting notes, officer disciplinary records, and other records. (Def. Ex. 4). Of these records, several 911 calls, the phone call recording between Kentrell Brumfield and Delicia Malveaux, and a body cam video were entered into evidence at trial. (State's Exhibits 1, 4, 30, 38). The 911 calls and phone recording were specifically mentioned in the prosecutor's jury argument. (9 R.R. at 65, 69-70).

In addition to brining the issue to the attention of the Court, Kentrell Brumfield preserved error by filing a motion for new trial, documenting the discovery violations under 39.14(d) and raising violation of Kentrell Brumfield's right to due process. (C.R. at 348-351).

B. Relevant Law

1. Issue Two, Part A: Statutory rights may be protected by the right to due process

The denial of a statutory right may constitute a due process violation. *See Morrissey v. Brewer*, 408 U.S. at 481 (due process requires due process protections when the loss of a governmental benefit or right would condemn an individual to suffer a grievous loss). *See also Maddux*, 545 S.W.2d at 460 (penalizing the exercise of a statutory right to appeal constitutes a due process violation); *Ard*, 191 S.W.3d at 344 (the statutory right to counsel on a Chapter 64 motion has due process implications); *Woody*, No. 05-95-00673-CR at *18 (mem. op., not designated for publication) (holding that the statutory right to jury punishment was protected by due process).

2. Issue Two, Part B: Article 39.14(d) creates a right to inspect discovery in the case for *pro se* defendants

> In the case of a pro se defendant, if the court orders the state to produce and permit the inspection of a document, item, or information under this subsection, the state shall permit the pro se defendant to inspect and review the document, item, or

> information but is not required to allow electronic duplication as described by Subsection (a).

TEX. CODE CRIM. PROC., art. 39.14(d).

> On the whole, the statutory changes broaden criminal discovery for defendants, making disclosure the rule and non-disclosure the exception.

Watkins v. State, 619 S.W.3d 265, 277 (Tex. Crim. App. 2021).

C. Argument

1. Issue Two, Part A: The right to due process required that Kentrell Brumfield be provided an opportunity to review all the discovery in the case

Brady v. Maryland pronounced a minimal constitutional right to discovery:

> The Supreme Court in *Brady v. Maryland* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The purpose of this rule was to avoid an unfair trial of the accused: "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." *Id*. at 86-88. The Supreme Court later explained that Brady essentially created a federal constitutional right to certain minimal discovery.

Pena v. State, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011) (citing *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Bagley*, 473 U.S. 667 (1985), and *United States v. Agurs*, 427 U.S. 97 (1976)). By enacting the Michael Morton act, the Texas legislature significantly expanded this minimal right to discovery.

Watkins, 619 S.W.3d at 291; *State v. Heath*, No. PD-0156-22 at *27 (Tex. Crim. App. 2024).

Texas's statutory discovery rights extend to *pro se* litigants. While the Constitution might not require the Texas legislature to create such an expansive right to discovery, once it has, the right to discovery is protected by the right to due process. *See Morrissey v. Brewer*, 408 U.S. at 481. Consequently, inability to review the majority of the evidence before trial has due process implications. Kentrell Brumfield was unable to review 911 calls, the phone call recording between Kentrell Brumfield and Delicia Malveaux, any bodycam or crime scene videos, calls between Yolanda Dennis and the district attorney's office, medical records, interrogation evidence, 911 call detail records, the firearms report, witness meeting notes, officer disciplinary records, and other records. (Def. Ex. 4). Kentrell Brumfield was not placed on equal footing to his former attorney and the severity of the impairment of his ability to review discovery is of such a magnitude that it has due process implications. *See Thompson v. State*, 89 S.W.3d 843, 852-53 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (Errors can so infect a trial with unfairness as to constitute a violation of due process).

2. Issue Two, Part B: Kentrell Brumfield's statutory discovery rights were violated

a. It is undisputed that Kentrell Brumfield had no opportunity to inspect evidence on the USB drive or District Attorney's portal that was not printed out for review

A *pro se* litigant has a statutorily-established right to review the discovery in the case. TEX. CODE CRIM. PROC., art. 39.14(d). Kentrell Brumfield established that he was not provided video evidence, 911 evidence, interrogation evidence, phone call recordings, crime scene video, witness meeting notes, the firearms report, officer disciplinary notices, and many other items of evidence part of the discovery in the case. (8 R.R. at 9-12); (12 R.R. at 10-18); (Def. Ex. 1, 2, 3, 4, 5). Kentrell Brumfield's ability to conduct discovery in this case was restricted by Harris County Sheriff's Office policy, the strict timeline in the case, and by an incomplete disclosure of records by trial counsel to Kentrell Brumfield. (Def. Ex. 1, 2, 3, 4, 5). The Court was made aware of the discovery problems before the trial commenced, but did not take any action to investigate or remedy the problem. (8 R.R. at 9-12). At the hearing on the motion for new trial, the State did not claim that Kentrell Brumfield had the ability to review all of the available discovery as a *pro se* litigant, instead relying upon other theories to contest the motion for new trial filed in this case. (12 R.R. at 18-26; 32-38; 43-44).

b. The State's claim that error is not preserved for review is invalid as is the State's claim that Article 39.14(d) was functionally satisfied when Kentrell Brumfield reviewed evidence with his former attorney and investigators

In order to attempt to rebut Kentrell Brumfield's Article 39.14(d) claim, the State offered evidence showing Kentrell Brumfield had an ability to access the evidence as mediated through defense counsel and investigators. (12 R.R. at 18-26; 32-38; 43-44). However, Article 39.14(d) puts the *pro se* litigant on the same footing as trial counsel – the *pro se* litigant is permitted to inspect evidence without the evidence being filtered through an attorney. TEX. CODE CRIM. PROC., art. 39.14(d). *See Faretta v. California*, 422 U.S. at 819-20 (1975). ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails"). Furthermore, *pro se* litigants are not required to rely upon their recollections of evidence in the case – they are entitled to direct access to evidence. TEX. CODE CRIM. PROC., art. 39.14(d); *See Britt v. North Carolina*, 404 U.S. at 229 ("We have repeatedly rejected the suggestion that in order to render effective assistance, counsel must have a perfect memory or keep exhaustive notes of the testimony given at trial."). The State's argument that previous, attorney-mediated access to discovery occurring at unspecified times is equivalent to direct access to discovery is

inconsistent with the terms of Article 39.14(d) and Supreme Court precedent holding that litigants are not required to rely upon their memories. *Id.*

Even if the trial prosecutor's theory that Article 39.14(d) could be satisfied through mediated access to the discovery materials[6] in the case had merit, the State made no showing that Kentrell Brumfield had an opportunity to review each and every piece of evidence in the case. Furthermore, the State made no showing that the audio and video evidence was played in its entirety. Finally, the State made no showing when Kentrell Brumfield last had an opportunity to review critical pieces of evidence in the case or whether Kentrell Brumfield could remember the relevant details of the critical pieces of evidence at the time of the jury trial in this case.[7] Consequently, the State failed to make a sufficient showing that any harm resulting from the Article 39.14(d) was mitigated or reduced.

Citing *Cudjo v. State*, the State's second line of argumentation was that error was not preserved in the case. *Cudjo v. State*, 345 S.W.3d 177 (Tex. App.—

[6] The stronger argument would have been that the harm of the Article 39.14(d) violation was mitigated by mediated access to discovery. Howevere, this claim suffers from the same lack of a sufficient showing by the State to support the conclusion that harm was mitigated in this case.

[7] Kentrell Brumfield's case was pending for about one year and eight months before the jury trial occurred in this case.

Houston [14th Dist.] 2011, pet. ref'd). However, *Cudjo* is immediately distinguishable from this case for the following reasons:

1) Kentrell Brumfield made his discovery issues known to the Court. (8 R.R. at 9-12). The trial court made it known that the case would be proceeding to trial, despite any evidentiary issues. *See Cardenas v. State*, 787 S.W.2d 160, 162 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (holding party is not required to make futile objections after trial court has just overruled valid objection).
2) *Cudjo* was permitted to work with hybrid counsel, who had access to the discovery at all stages of the case, and hybrid counsel participated in the trial.
3) *Cudjo* waited to the last minute to assert the right to proceed *pro se*. This was not the case here. (2 R.R. at 4); (3 R.R. at 6, 16); (5 R.R. at 3); (C.R. at 67); (C.R. at 98); (C.R. at 118); (C.R. at 121); (C.R. at 161-162); (C.R. at 187-190).
4) Kentrell Brumfield lacked the information needed to identify what discovery had been provided to him, what information was placed on the USB but not provided to him, and what information was on the district attorney's portal, but not on the USB. If Kentrell Brumfield

was ever shown the discovery log in the case, it was on the eve of opening statements. (8 R.R. at 7). Not having seen or access the USB drive, it would have been impossible to compare the materials on the USB drive to those on the District Attorney's discovery portal.

5) There was no motion for new trial filed in *Cudjo*.[8]

Inasmuch as the State relied upon *Cudjo* to imply that the discovery issues in this case, this reliance was wholly unfounded.

D. Harm

1. Limited Access to Discovery

This issue is discussed *supra:*

- Link to Issue One, Section D(1): **Kentrell Brumfield was harmed** by limited access to discovery

Kentrell Brumfield was unable to review several critical categories of discovery, including 911 calls, the phone call recording between Kentrell Brumfield and Delicia Malveaux, any bodycam or crime scene videos, calls between Yolanda Dennis and the district attorney's office, medical records, interrogation evidence, 911 call detail records, witness meeting notes, officer

[8] *See Case: 14-09-00263-CR*, FOURTEENTH COURT OF APPEALS (Last visited Aug. 12, 2024) *available at* https://search.txcourts.gov/Case.aspx?cn=14-09-00263-CR&coa=coa14

disciplinary records, and other records. (Def. Ex. 1, 2, 3, 4. 5). In terms of quantity, more records were unavailable to Kentrell Brumfield (either due to being on the USB drive or not having been included on the USB drive) than were furnished to him for review. (Def. Ex. 4). Even had Kentrell Brumfield been provided additional time to prepare for trial, unless the critical discovery issues were addressed by the Court,[9] Kentrell Brumfield's right to review the discovery would be seriously impaired. As can be seen from the USB drive provided by trial counsel, Kentrell Brumfield did not have any access to attorney or investigator notes that would allow him to address some of the disadvantages caused by encountering some evidence and exhibits for the first time at trial or prepare for cross examination. (Def. Ex. 4).

2. Under either the harmless error or error affecting substantial rights standards of review, Kentrell Brumfield was harmed in this case

As Kentrell Brumfield noted during his closing arguments:

> THE DEFENDANT: Again, my evidence was left out. The evidence that y'all seen and the audio that I seen and heard, I watched with y'all.

[9] For example, were Kentrell Brumfield provided a laptop and access to all the discovery in the case through the District Attorney's portal, the discovery issues complained of here might be resolved.

(9 R.R. at 62). Specifically, one major piece of evidence Kentrell Brumfield wanted to highlight was firearms evidence. (9 R.R. at 41). Kentrell Brumfield's theory of defense was Lioneicia Malveaux was shot by another person's bullet. The firearms report in this case, which was not part of the evidence on the portal or the USB drive, may have supported Kentrell Brumfield's theory of defense, at least raising the inference that there would have been multiple shooters in the case, consistent with Kentrell Brumfield's theory of ambush. (Def. Ex. 4, Def. Ex. 5, Def. Ex. 7).

While Kentrell Brumfield was provided copies of some of the important discovery in the case, the quantity and quality of evidence Kentrell Brumfield was not permitted to inspect implicates Kentrell Brumfield's substantial rights and is of a magnitude that implicates Kentrell Brumfield's right to a fair trial. *See Watkins*, 619 S.W.3d at 278-79 (due process implications arise when evidence is "specifically tied to the jury's determination of guilt or innocence."). In a post-Michael Morton act world, it would be unimaginable for an attorney to prepare for trial without combing through discovery with an eye to the presentation of evidence at the trial in chief. However, this is exactly what Kentrell Brumfield was required to do in this case.

Under the harmless error standard (due process violation) or substantial rights standard (39.14(d) violation), Kentrell Brumfield was harmed. Preventing a litigant from viewing discovery materials "adversely affect[s] the integrity of the process leading to the conviction." *Wells v. State*, 611 S.W.3d 396, 410 (Tex. Crim. App. 2020). It is unclear how Kentrell Brumfield could be expected to marshal the evidence in his case, when he may have never seen it and may have been unaware much of it even existed. The quantity and quality of the evidence not available for discovery was extremely significant, and included exhibits offered at trial as well as a firearms report central to Kentrell Brumfield's theory of the case, and Kentrell Brumfield consequently suffered "some harm" in this case. *Cain*, 947 S.W.2d at 264. Furthermore, the right to discovery is essential to the fairness of a jury trial, and Kentrell Brumfield's right to inspect discovery was seriously restricted in a manner that impacts his substantial rights.

PRAYER

Kentrell Brumfield prays that this Court reverse his conviction in Cause 1776751 and remand his case for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Appellate Brief has been electronically served upon the State of Texas on August 18, 2024.

NICOLAS HUGHES,
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CERTIFICATE OF COMPLIANCE

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