

**Court of Criminal Appeals**  
**March 2, 2016**

*Ex parte James Richard “Rick” Perry*

No. PD-1067-15

Case summary written by Abigail Drake, Staff Member

PRINCIPAL JUDGE KELLER delivered the opinion of the Court as to Parts I, II.B.3, III and IV in which JUDGE KEASLER, JUDGE HERVEY, JUDGE ALCALA, JUDGE YEARY, and JUDGE NEWELL joined and announced the judgment of the Court and filed an opinion as to the remainder of Part II in which JUDGE ALCALA and JUDGE YEARY joined.

The State of Texas indicted the Defendant for actions taken when he was the governor of the state. He threatened to withhold funding from the Public Integrity Unity of the Travis County District Attorney’s Office until District Attorney Rosemary Lehmberg resigned. A Travis County grand jury indicted the Defendant for “abuse of official capacity,” alleging that he abused his official capacity by misusing funds appropriated for the Unit, and for “coercion of a public servant,” contending that he coerced a public servant—Lehmberg—by threatening to withhold funds until she resigned from her position.

The trial court denied the Defendant’s application for pretrial writ of habeas corpus based on constitutional challenges to criminal statutes. The court of appeals affirmed in part, reversed in part, and remanded with instructions to dismiss the charge of coercion of a public servant.

**Issues:** 1) Can the Defendant raise his separation of powers complaint as an as-applied challenge in a pretrial habeas application followed by an interlocutory appeal? 2) Is the prosecution of the exercise of a veto under the “abuse of official capacity” statute a violation of the Separation of Powers provision of the Texas Constitution? 3) Is the relevant portion of the “coercion of a public servant” statute, being used to prosecute the threat to exercise a veto, facially unconstitutional in violation of the First Amendment?

The Court of Criminal Appeals concluded that the court of appeals erred in not allowing the Defendant to litigate his as-applied claims

before trial because the constitutional right at issue (his veto power) entitled him to raise his claims by pretrial habeas corpus. The defendant's veto power would be effectively undermined until trial on the issue. If a statute violates separation of powers by unconstitutionally infringing on a public official's own power, the mere prosecution of the public official is an undue infringement on his power and worthy of pretrial habeas corpus.

Moreover, the "abuse of official capacity" statute violated the Separation of Powers Clause as it applied to the Defendant's veto power. The Texas Constitution allows the power to veto and does not seek to limit vetoes based on the reason for them. The Legislature cannot seek to limit the power of the governor's veto by making them a crime, and neither can the judicial branch.

As for the charge of coercion of a public servant, the statute is overbroad in its interpretation. The Legislature seems to have conveyed that any offense can be the subject of a threat, whether or not it affects another person or another's property. This construction is broad enough to find a judge's intent to write a dissent to violate the statute. As such, it violates the First Amendment in its overbreadth. Additionally, the Defendant, in his capacity as governor, did not qualify as a "governing body" under the statutory exception to the offense of coercion of a public servant, which allows an exception for a member of a governing body over a governing entity. As the governor is merely one person and not a collection of members, he does not qualify as a governing body. Therefore, the exception does not apply and the statute still violates the First Amendment in its overbreadth.

Finally, the conduct said to be proscribed by the coercion statute is proscribed by other statutes. Therefore, the statute has no life of its own and is redundant. The legitimate sweep of the statute is minimal, while the constitutional objections are extensive.

The Court reversed the judgment of the court of appeals as to Count I (abuse of official capacity) and affirms the judgment of the court of appeals as to Count II (coercion of a public servant). The case is remanded to the trial court to dismiss the indictments against the Defendant.

JUDGE ALCALA filed a concurring opinion.

The Court is correct in implicitly rejecting the category-of-the-claim approach to habeas pretrial cognizability, but failed to reach a consensus as to the proper cognizability analysis. The proper approach should be the one used in the lead opinion, which looks to the nature of the constitutional claim presented and the particular facts of the claim. Furthermore, judicial economy considerations should never play a role in determining pretrial cognizability.

JUDGE NEWELL filed a concurring opinion in which JUDGE KEASLER and JUDGE HERVEY joined.

The Court is correct in holding that the prosecution of the Defendant for the use of his veto power violates the Separation of Powers Clause and prosecuting the Defendant for threatening to use his veto violates the First Amendment. The treatment of this case was made more complicated due to who the Defendant was, and an approach under *Ex parte Boestcher* would have addressed the Defendant's first count of the indictment and would have solved the situation in an easier and more correct manner.

JUDGE MEYERS filed a dissenting opinion.

The Majority appeared to twist the law in order to vacate the charges against Governor Perry precisely because of who he is, not because the indictments violated the law. Pretrial cognizability did not exist here because the resolution of the issues would have been aided by factual development. Moreover, the indictment did not state what "misuse" was being charged against the Defendant, so the Separation of Powers analysis was improper. Additionally, the Texas Constitution does not proscribe prosecuting the Defendant for the use of his veto power.

Finally, common sense and reasonable construction demonstrate that the coercion statute is not overbroad in the use of the word "threat."

JUDGE JOHNSON filed a dissenting opinion.

This case does not involve separation of powers, many of the examples used are unsuitable, and the language used as to the

Defendant is different from all other writ opinions, likely because of his position.

This case involved the executive branch of the State interfering with a branch of county government, the consequences of which are not protected by Separation of Powers. Furthermore, the examples used by the Court to show the overbreadth of the statute do not apply to the statute itself. Finally, the constant references to Governor Perry using the honorific instead of “Appellant” show the Court’s bias to the former governor.

***Cameron v. State***

No. PD-1427-13

Case summary written by Jenée Duran, Staff Member.

JUDGE HERVEY delivered the opinion of the Court, in which PRINCIPAL JUDGE KELLER and JUDGES MEYERS, KEASLER, RICHARDSON, AND NEWELL joined.

Vanessa Cameron was convicted of organizing a murder-for-hire scheme to kill her child’s father for life-insurance benefits. Before jury selection began, the defense counsel implied that the bailiff excluded the public from the courtroom, including the defendant’s family and friends. He objected that this exclusion violated his client’s right to a public trial. The court stated that it was not issuing a ruling on defense’s objection, but was merely stating that there was no room for the defendant’s friends and family, and having all of them in there posed a security risk. The court reiterated that there was no ruling on the objection by defense counsel. The jury subsequently found the defendant guilty. She appealed, arguing in part that her trial was closed to the public.

A divided court of appeals held that Cameron’s right to a public trial was violated because, despite the trial judge’s insistence that he had not closed the courtroom, the record reflected that he had closed the courtroom, and Cameron’s Sixth Amendment right to a public trial was violated. Even though an accommodation for members of the public to observe the voir dire from the courthouse foyer was suggested, there were no steps taken to facilitate the suggested accommodation. The

trial court did not consider all reasonable measures to accommodate the public during voir dire.

The State appealed the judgment of the court of appeals, stating that Cameron had failed to preserve her complaint for appellate review and the appeals court erred in not addressing that preservation matter. They asserted that it was Cameron's burden to show that her trial was closed to the public and that she failed to meet her burden.

The Court of Criminal Appeals affirmed the appellate court's judgment, holding that the trial record "sufficiently shows that the voir dire proceedings were closed" and that it was not justified under the Sixth Amendment. The State then filed a motion for rehearing, arguing that the court's decision would be difficult for trial judges to implement and that it had erroneously dismissed the burden of proof for review. The motion for rehearing was granted.

ISSUE: Was the defendant's right to public trial violated because her friends and family were not allowed in the courtroom?

The court discussed that the violation of a defendant's right to public trial is structural error that does not require a showing of harm, and to prevail on a public trial claim, a defendant must first show that the trial was, in fact, closed to the public. To determine if a trial was closed, a reviewing court must look to the totality of the evidence, and, if it is determined that the defendant's trial was closed, then the reviewing court must then decide whether closure was proper.

The court held that the initial burden of proof is on the defendant to show that the trial is closed to the public. If a defendant fails to carry that burden, the analysis is concluded. Only after a trial is determined to be closed to the public is it necessary to determine if closure was justified. The court also held that when dealing with Sixth Amendment right to a public trial, deferring to a trial court's findings of fact supported by the record is a necessary prerequisite to show the defendant's trial was closed to the public based on the totality of the evidence.

The court then vacated the judgment of the court of appeals based on the decision that the initial burden of proof was on Cameron to show that her trial was closed to the public, after explaining the applicable standard of review on appeal, and remanded the case to apply this opinion's principles.

JUDGE ALCALA filed a dissenting opinion.

Judge Alcala stated that this case was correctly decided on its original submission, based on the same reasons shown in the Court of Criminal Appeals original opinion in this case, in which the majority of the court determined that the voir dire proceedings were closed and that such closure was unjustified in light of the trial court's failure to make findings to support a legitimate overriding interest for the closure.