

We will now move to the second case on our docket. That case is Hampton versus the state of Florida.

>> May it please the court. I'm here representing Mr. Hampton in the case. I have five issues and I would like to focus on issue one and briefly touch on issue five, however as always the court has questions on the other issues I will be happy to address them. The reason why I have chose issue one is because this case falls under this court's narrow exception where a juror misled the court on the direct question as to whether or not he or a family member had been accused of a crime.

And when juror number 10 was asked this question directly by trial court and he said, Oh yes, my sister had been involved and know there were no problems, no I don't have any bias.

And he completely ignored the fact that he had been arrested or goes via that point in time what did he know?

>> He had been arrested.

>> A police officer gave him something.

It was not a notice to appear.

>> You know, he was arrested.

>> He was taken into custody and release.

There was no future court date at that point in time?

>> No.

>> There was nothing and as far as he was concerned it was over.

>> No.

>> You and I know that but did he know it?

>> I believe he knew he was in trouble.

>> Typically one gets put -- booked at a county jail and is given a future court date.

You don't get released from jail without getting a future court date or something to come back to.

>> I'm not sure how misdemeanor courts work.

Obviously felonies are a lot more serious.

It took weeks for the state to get around to charging him.

[INAUDIBLE]

>> I don't know if he was given a copy of the affidavit that the officers got.

>> I'm a little confused.

I thought the argument that there was misrepresentation by this juror was robbed by the defense lawyers because they realize that the questions asked did not actually -- that there was not as representation and the argument was more of a qualification.

Are you arguing misrepresentation or are you arguing the automatic disqualification are both?

>> Both.

>> Am I incorrect that the defense lawyers after they looked at the transcript realized that there wasn't a misrepresentation?

>> No, I see that they didn't -- they drafted the First Amendment and they measure their motion and they didn't exactly make a motion for a new trial however the state was claiming lack of due diligence which is one of the de la Rosa requirements.

Did the attorney lack diligence by not questioning the jury more?

And the fact that the trial judge asked a direct question, got a response -- to that questionnaire that said either a family member or a friend, so the defense counsel had no reason to believe that they had to go further and question this juror further.

>> Where I come from that would have been 45 minutes worth of questioning of the jury.

We have a question here where, have you ever been, have you or

any member of the immediate family or close friend then interviewed?

Yes.

There were no questions at all by defense counsel, from the judge or defense counsel.

>> In the Texas case this court -- but that particular case of a trial court directly asked that question, defense counsel need not go any further.

It was a direct question and there was a direct response in the juror, when she was asked that question she said yes, me and my grandfather.

>> So how in the world, you know, what concerns me is that as far as I can tell from his record he was not given any -- He might have been arrested as you say by the police but then he was let go and he wasn't given anything that indicated in any way that there was going to be anything further on this.

So that is my concern, how could he at that point before the filing of the complaint or the information no that he was now being accused of a crime?

>> Well, being arrested should be enough.

The question becomes then, what would a reasonable juror believe that he is in trouble with this particular state attorney's office and --

>> How would he know?

Without having something?

>> In Pinellas county --

>> Do we know what the officer may have said to him?

Did the officer say you were going to have to answer to this later?

>> There was no evidentiary hearing because the juror, the judge denied access to that juror.

So I mean we are after two possible remedies.

>> Can we go back to this issue of preservation?

In the motion for a new trial,
they only alleged that juror was
under prosecution to disqualify.

That the argument about
misconduct was not --

How was it preserved?
I wanted to make sure about
that.

>> What the state raised is the
fact under de la Rosa is due
diligence.

>> No, I'm asking you how is it
preserved before a trial?

You know, if nothing was raised.

[INAUDIBLE]

>> How was it raised posttrial?

>> By asking for a chance to
interview the juror number 10
and filing a motion for a new
trial.

>> I thought the motion for a
new trial was based on it was
under prosecution.

I mean, that is a statute
under -- if he was under
prosecution he would be
disqualified as serving as a
juror.

He was not under prosecution at
the time.

Based on what Justice Quince and
Justice Labarga are saying,
correct?

He was not under prosecution.

>> I'm saying the destination
was not released in time.

>> So now there are two issues
that you want us to look at.

One is clearly preserved, which
is whether he was under
prosecution under 40.013 and
there we have a situation where
somebody is given a paper,
nothing is filed until after,
after the voir dire.

>> We had no access to the
juror.

>> So you are saying you need it
because the issue of when these
points in time occurred are not
controverted?

>> When that arrest affidavit
was filed the question might
become, did he realize he was
under arrest and was he given

paperwork?

Was he given access?

[INAUDIBLE]

>> It should be for a reasonable person to feel when they are arrested.

>> It seems you are arguing two different issues altogether.

One is the issue whether under the statute this individual was under prosecution, a separate issue, totally different issue was de la Rosa.

Do you agree?

>> While --

>> You don't have to be under prosecution under the de la Rosa standard.

>> And de la Rosa the question becomes and yeah and de la Rosa the question was was it disclosed?

>> It's two different questions. Could you please in your response, please try not to merge those two because one is talking of -- one of the justices is talking about prosecution and you are talking about arrests.

It is a disservice to try to get to this point where it should eat.

So if you could address it in that fashion --

>> Under prosecution, it has never been defined and 40.013.

We don't have a set date.

The case of Tucker, well it is most likely when the state filed information.

However, trying to get to the very end of Tucker they said well, even if this juror was under prosecution was he given a citation on a traffic case?

We had an evidentiary hearing.

We have found that she did not know that this was a criminal citation.

That this was strictly a matter of fines.

That it was from a long time ago and so they were able based on the evidentiary hearing to

determine that there was no prejudice.

We didn't have that here.

>> Sticking with 40.013 I wouldn't think prejudice would have to be established.

If somebody is under prosecution they are disqualified.

>> That is correct.

They found that because this juror did not think she was under prosecution and it was a traffic citation, does the state government follow up on these things?

That kind of got around that exception when no prejudice is involved.

>> I'm trying to go back to -- do you agree with what Justice Lewis is saying?

They are two different things. One is the jury is disqualified where they are under prosecution for any crime.

The other is was there a misrepresentation are a failure to follow-up on questions and then -- that is de la Rosa.

So, what kind of an interpretation can be provided that would be beneficial to your client that he was under prosecution for any crime before or at the time of jury selection?

>> At the time the prospective juror, at the time.

>> So you would say although the statute says the prosecution, really prosecution means arrest? That is contrary.

Let me finish.

Is in that contrary to plain language of that statute?

If they said anybody had been arrested for any crime and not serve that would be a different situation perhaps.

The prosecution has a legal meaning, doesn't it?

>> It has several different legal meanings.

In Brown the definition is given under the statute of

limitations.

They strictly rejected that definition.

This court -- we don't have a definition.

What we do have is Lowery.

>> So given the same set of facts that this juror had been arrested that night, no information or complaint was ever filed.

He would have been under prosecution at the time that he was serving on the jury?

>> Right, unless --

>> Excuse me?

>> He was asked had he been accused under prosecution.

>> Now it is de la Rosa.

Can you stick with --

>> The reality is that --

>> That is a simple question.

Would he have still been under prosecution if no information or complaint had ever been filed after that night?

I believe so because the whole purpose of Lowery is to prevent someone who may be trying to curry favor with the state from serving on a jury and getting a conviction while he is attempting to curry favor with the state.

>> What the Justice Quince is asking is he got arrested on that particular day and taken into custody and released.

[INAUDIBLE]

If the state had not filed the information whenever it did, what would have happened to that charge?

>> Eventually it could be charged.

>> No, no, no.

The question, if the state had not filed information ever, ever, ever what would have happened to that juror?

>> There are precharge negotiations that happened frequently especially in drug cases.

>> She is under prosecution

until the statute of limitations expires.

>> Has something to worry about until that the statute of limitations goes away.

>> It provides for a method of prosecution and they say that prosecution of non-capital crime shall be solely information.

Those are the three ways to do it.

There was no information and there was no obviously no indictment in this case so how could this be under prosecution if the prosecutions were not followed?

>> Because if we are trying to prevent a defendant --

On another person's case from trying to curry favor they shouldn't be allowed to manipulate that case.

>> You are going back to the de la Rosa argument as to whether or not this person should reveal something like he was arrested in that kind of thing.

I'm talking about under prosecution.

Let's stick to that issue.

>> Lowery dealt with 40.013.

>> The question Lowery was under prosecution.

>> Now we are trying to deal with the deposition which never has really been developed.

>> What is wrong with the definition that has been subjected that there are three ways you are under prosecution.

What is wrong with that?

This court should write under prosecution of the statute means, and then three ways you are prosecuted.

What would be legally incorrect about that?

>> The idea that it doesn't include arrests.

>> But it does not say arrests.

>> It does not include arrests.

>> I understand your position where you are saying this wasn't just an arrest for what turned

out to be a pretty -- situation but he had been arrested for a murder charge.

The court knows he is going to be serving on a jury and nobody mentions that they are under arrest and there are active negotiations.

Certainly we would not want that person sitting on a jury so now we go back to the question that you want -- the statute would have to be expanded to say under arrest if the legislature felt that was a automatic disqualification.

On the de la Rosa issue, you do not agree that the defense lawyers drop their de la Rosa argument after they looked at the transcript and looked at what was asked and answered as to whether there was a misrepresentation?

>> Without an evidentiary hearing it did not happen on either one of the motions.

>> The simple question as to whether they dropped it off for did they do this?

>> I believe that when you look at the disqualification of the 40.013, things get a little blurry but a look at Lowery and look at the fact that they also used de la Rosa.

>> This type of thing happens in civil litigation, jury selection.

Were jurors ever asked, have you ever been involved in litigation and what people think was litigation, the court, judge, lawyers.

Well they say no.

Then later we learn, they were involved in a Social Security claim.

A workers compensation claim.

They don't think of those things as litigation.

Here, one sure is asked have you been accused of a crime?

He says he is in the defense lawyer, they come back up and

say we are talking about
litigation.

We are talking about all of
these things and then you see
the hands going up.

Here, they could've asked we are
talking about a crime.

That means being taken into
custody for anything, arrested
for not having a driver's
license or things like that.

That is what I'm talking about.
They did not ask follow-up
questions.

>> I would say under the case in
Lowery in Texas the direct
questions was asked and all the
mentioned was his sister.

If they were to ask was there
anything else?

Have your been accused of a
crime?

Have you ever been arrested?

There is probably a good reason
why they said that was good
enough.

Their reasoning as the direct
question is also have to worry
about alienating jurors that are
sitting on your panel.

You don't really want to accuse
them of having misled the court.

>> You misunderstood, it
encompasses this as well.

Other jurors don't know
exactly -- and they should ask
those follow-up questions.

>> In hindsight, maybe, yes.

As far as where the de la Rosa
case comes in in the concurring
opinion so everything fell under
de la Rosa and 40.013.

>> I'm not sure we have a direct
answer to the question that is
still pending.

The question of, was that Wade
before the lawyers preceded?

>> Bay red under 40.013, they
didn't get anything except we
believe this juror could have
been legally disqualified.

The focus was on the 10 days.

The focus was when they
discovered it and the trial
judge denied the interview

because it was beyond the 10 days because there was due diligence.

Whether or not due diligence, catching up on this juror during trial.

>> The page 43 there are criminal accusations that they ruled on applicable and it was only because Mr. Hampton's counsel evidently saw the juror at the criminal courthouse in October and suspicions were aroused.

The first time you mentioned that is in the brief.

That was not raised down below.

>> It was raised in the trial court's order and to respond to that in an amended motion, I believe the motion to interview, was that they had done everything they could once they saw the juror showing up in the courthouse and they finally made the ultimate discovery on November 17 and they filed a motion on November 19.

So I mean they were responsive to that in the judge's order saying you did not file within 10 days.

As far as whether or not the concept of the concealment, I believe even though it's two separate issues, it becomes all part of the fact that you know, dude juror number 10 think he was in trouble?

Why would he not reveal that information?

It was a broad question.

It was not a narrow question.

>> The questionnaire asked --

>> That is what the judge said.

>> The question was never asked, were you arrested for a crime?

Have you ever been arrested for a crime?

Is there difference between arrested and accused of a crime?

>> I believe that would have to encompass arrest.

>> Do you believe that but if he was asked the question, have you

ever been arrested for a crime and he did not answer that, it would be a different case?

>> The juror W was given a citation in the parking lot in the middle of a trial and now the question was well, what she accused of a crime the crime at that point?

It never does develop a firm definition and when they get to that and they say wow even if she wasn't -- was a crime at that point or was under prosecution at that point?

We had done our evidentiary hearing and we found that under this circumstance it is not fall under Lowery.

Lowery is a very narrow exception, but it has a very important and supple which is the jurors should not be allowed to sit on a jury in the same jurisdiction when they are facing criminal charges because of the fact that it looks like they are trying to curry favor. And Tucker points out that why would they feel that if they weren't trying to speak to the fact that there was some kind of bias or possible bias going on?

>> You wanted to reserve.

>> A few minutes.

>> You are down to 3.5.

>> The only other thing with the that other than the Ring case, the still pending trial in other cases similar.

They had an oral argument so I'm just giving you an update on that and as far as mitigation goes, I do believe that a new penalty phase is required because Dr. Berland's expert counsel was erroneously rejected by the court without justification.

Thank you.

I will save the rest.

>> May it please the court.

Good morning your honors, I'm representing the State of Florida.

This is a direct appeal out of Pinellas county. The defense's primary argument is there a jury disqualification claim and the court has pointed out there are two separate claims.

>> There is a general question and I think this is a difficult area.

Let's assume it wasn't that he was arrested for loitering but he was arrested but nothing else had happened.

The same exact jury questionnaire he was accused of a crime or under prosecution.

And that juror answered no to those and states, because it is the same jurisdiction, knew this was going on.

The argument that because accused is not being -- mean arrested and until the state actually files charges, that keep somebody and that juror would be susceptible to being on the jury or would you see a problem?

>> Your Honor, in the area this court has proposed that would be an outright misrepresentation where you say the juror answered no.

>> All they were were arrested.

>> Well in this particular case we have our jury questionnaire where the juror answered yes.

As to the issue --

>> Is accused and arrested the same?

>> Supplemental volume one the question is on the jury questionnaire, have you or any member of your immediate family or any close friend, and the number foreign to that, been accused of a crime and juror number 10 check's.

>> Then the judge asked the same question?

>> What the judge asked was a compound question.

It's in the record, Your Honor. I believe we set it out in our

brief.

What the judge is asking, he does as asked a general question to the panel and he gets no response.

Okay, if you are a family member been accused of a crime?

>> Isn't that the same?

>> He asked that of everybody and apparently no one is raising their hands so he starts going individually.

When it gets through that process of going down the line, the question then becomes, did the case get processed through the court system and with their satisfaction with the way was processed?

>> This juror is asked them, that question and he says yes, my sister.

Doesn't he than a minute that he has -- it's not like he could forget this because it happened two weeks before, that he had been arrested two weeks before or whenever it was.

Isn't that an omission?

>> Your Honor, it is certainly an incomplete answer but the question, when the got to that juror, was the compound question, did your case get processed through the court system and was their satisfaction with the way it was processed?

So that is --

>> Excuse me.

This juror apparently have already concealed, had not answer the question, has anyone been accused of a crime and that general question was given to the entire panel.

>> No one answer that question.

>> We don't know about anybody else but this individual sitting there did not respond.

That is where we are at that point.

>> That is where we are, no one and when there were other jurors that were asked --

>> What prompted those question if everyone was silent with regard to never being accused of a crime?

>> Likely it was the fact that the trial court started going down the line and saying are you satisfied?

>> I wonder what happened.

>> There is no response.

>> You so the court on its own asked are you satisfied with the preceding when no one admitted they had ever been involved in the preceding?

This is not making a lot of sense.

>> Your Honor it does when you see that the trial court --

[INAUDIBLE]

The trial court says okay this is what I am going to go on to. I'm going to move onto this topic so --

[INAUDIBLE]

>> He has that inquiry.

>> Someone had disclosed that then?

>> Yes absolutely but Your Honor there is ambiguity in the question I believe that is why defense counsel admitted below when they filed their motion, the defense motion is filed Your Honor into the record.

The original motion for a juror interview did allege, paragraph 2, during voir dire to direct question on the issue and he was currently under prosecution by the same officer prosecuting the defense case.

Deleting that entirely.

>> In response to Justice Lewis, he was asked directly, have you or any member of your family been accused of a crime?

He says yes, my sister.

Here is my question.

This may not be in the de la Rosa prong but we have a case here and we are already setting this up by the questions that are being asked, and that these lawyers maybe were not, maybe

should have followed up and maybe should've asked if the questions.

They didn't do it so now is that not better that we have a jury interview kind of get this out, see it?

I mean if it was murder I think you would be saying we had better look at this and get another shot at this but it may be a nothing issue.

It may be very likely that it would not have led to any decision to strike this juror, but we have all know now rather than five years from now.

>> Your Honor in this respect it is similar to the Lamar Johnson case which was sent back.

It was affirmed on direct appeal on a juror's qualification based on nondisclosure and when the case went back, as there always is, there was a claim of ineffective trial counsel where the issue was developed more fully.

With the juror of nondisclosure have caused the defense to exercise a preemptory challenge? Would have caused them not to have wanted this juror?

And so to the extent that is what is concerning Your Honor, I would believe perhaps a more appropriate vehicle is not to remand for a new trial, if first-degree murder trial.

>> I thought they asked for a juror interview.

>> The asked for a juror interview.

>> It would likely mean it would does not meet the other answers, but there is not --

We do not want in death cases to have jurors think that they can answer questions partly.

This is a life-and-death matter and again in this case, he was arrested.

If this was a year before, but what is the timeframe between when he was arrested for this

and when voir dire occurred?
>> The boardroom was the third week in January.

>> So it's not like I forgot I had been arrested.

Although I appreciate he's not under prosecution it's not as if he had execution and this was going to go way.

He possessed marijuana?

>> No, actually it was a loitering and prowling arrests and he had pipes that he said he used to smoke marijuana so it was paraphernalia and a first-degree misdemeanor.

>> Something I would want to know is a lawyer.

Maybe I would want this guide.

>> You have a former baseball player who is unemployed now and he may be very desirable.

>> He might be but --

He did not answer a question that was asked.

I don't know what is misleading or misleading about the question I was asked to him?

>> I'm not saying the question itself was misleading.

>> The first question is, has anyone been accused of a crime?

>> That was the whole panel.

>> The that is exactly what happened in de la Rosa and some of the answers.

The question was to the entire panel and they do not disclose it.

They go through and others discuss what happens with regard to their lives and yes I have had these cases and those things.

They are not disclosing anything and nondisclosure is no different than a false disclosure when a question is asked.

>> When you evaluated under de la Rosa Your Honor you look at the three prongs of de la Rosa and the first one is the information must be relevant and material.

We have no allegations by the defense in any of their motions that they would have exercised any challenge to this juror.

>> Now we are going into the substance of the de la Rosa claim and you may be right on that but then the question comes up and has been posited to you, why would you not need to know the circumstances of the event before you can do the de la Rosa inquiry?

>> Your Honor, I would actually prefer discord back to Lamar Johnson in direct appeal and postconviction.

You know what the answer to that is.

Have you been arrested?

We know he was arrested.

>> Okay and the records discloses what he is arrested for so you are saying the record is complete without further inquiry with regard to this juror?

The facts are there in de la Rosa is deciding the fate.

That is your argument there?

>> Absolutely.

We know he was arrested.

We are not contesting that.

>> So we are arguing then that a mere arrest is not being accused of a crime?

That seems to be your logical extension, the fact that he is arrested does not translate into he has been accused of a crime.

>> No, Your Honor and let me clarify.

I believe in response to Justice Lewis, where you have, you need to know what he would find out and you would find out that he was arrested.

That doesn't mean he was not accused of a crime.

>> Are you conceding that he was accused of a crime at the time that he was questioned in voir dire?

I am conceding he had been arrested on June 6 and I am

arguing that he did not disqualify him from jury service.

>> I am trying to understand what happened.

I will review the transcript but there is the general question to the panel.

You say there is no response to that, but then there is the follow-up question to certain members of the panel.

Is that correct?

>> That is correct her on her.

>> There is some reason that there was a follow-up to certain members of the panel.

Right?

What am I missing?

>> I believe the court just went down the road.

This is a topic I'm going to get into and then going down the road.

As they go down the road, the question goes into the compound, and he dissatisfaction with the way was processed?

>> But we would assume from that the court did not understand that their silence meant that they all had none.

To the general question.

>> The that's true.

I think that is fair.

I agree you're on her.

>> Well, this doesn't make any sense.

I've never been in the courtroom where a judge starts asking questions that are follow-ups in response to an affirmative response and there is no affirmative response.

Let's go through and see how they like the preceding even though they have never been accused of a crime.

Does that make sense to a lawyer?

>> Your Honor this is my reading of the record.

I believe, the way I read through the record, the way the questions went through and when

the judges was going row by row.
>> The truth is that it seems like whether he was accused of a crime and people are wanting to raise their hand in go and go me, me, me.

I assume that the judge sought -- it could be something else in the record but Justice Labarga knows this is a trial lawyer and a trial judge, it's amazing as soon as somebody pops up a something everybody starts answering.

It's a dynamic of jury questions.

I just want to make sure that he answered those general questions to the jury accused of a crime who have said and I think you answered to Justice Lewis and to me, that should have elicited a yes answer from the jury.

From the jury.

>> Yes.

>> Okay.

>> Could you make the argument, could you explain whether the issue concerning the answer of the juror was preserved?

>> The issue with regard to the nondisclosure was not part of the motion for a new trial.

The motion for a new trial relied on the disqualification issue, Your Honor.

And so we have argued that now the motion for a juror interview, the motion for a new trial which is at page 304 of volume two argued that he, the defendant did not receive a fair trial because no person was under prosecution for any crime should he qualified to serve as a juror.

>> Did they raise the request for the juror interview?

>> They raised in the request for the juror interview.

>> So that is sufficient preservation than?

>> We have argued that the motion for a new trial did not look at that issue.

It was raised in the motion for a juror interview which was denied as untimely.

With respect for the motion for new trial --

>> That was the basis.

The denial was based on untimeliness not on the merits?
>> It was based on untimeliness because the guilt phase ended on June 25.

The defense counsel saw the juror in August and October and it was not until November for the juror interview.