PD-1265-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

| | | |
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| MICHAEL RAY SENN,<br>*APPELLANT* | § | FILED<br>COURT OF CRIMINAL APPEALS<br>12/27/2018<br>DEANA WILLIAMSON, CLERK |
| V. | § | NO. PD-1265-18 |
| THE STATE OF TEXAS,<br>*APPELLEE* | § | |

STATE'S PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS IN CAUSE NUMBER 02-15-00201-CR REVERSING AND REMANDING THE TRIAL COURT'S JUDGMENT ON PUNISHMENT IN CAUSE NUMBER 1308222R IN THE 213TH JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS

§ § §

**STATE'S PETITION FOR DISCRETIONARY REVIEW**

§ § §

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## Identity Of Judge, Parties, And Counsel

Pursuant to TEX. R. APP. P. 38.1, the following is a complete list of all parties to the trial court's judgment and the names and addresses of all trial and appellate counsel:

1. Michael Ray Senn, the defendant, to be served through his attorney of record on appeal, William R. Biggs, wbiggs@williambiggslaw.com, 115 W. 2nd Street, Suite 202, Fort Worth, Texas, 76102.

2. William R. Biggs, attorney on appeal for the defendant, wbiggs@williambiggslaw.com, 115 West 2nd Street, Suite 202, Fort Worth, Texas, 76102.

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4. Sharen Wilson, Criminal District Attorney, attorney for the State, her assistants at trial, Page Simpson and Erin Cofer, and her assistants on appeal, Joseph W. Spence and Helena F. Faulkner, ccaappellatealerts@tarrantcountytx.gov, 401 W. Belknap, Fort Worth, Texas, 76196-0201.

5. Hon. Louis Sturns, judge presiding at trial.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

## Statement Regarding Oral Argument

The issues presented in this State's petition for discretionary review can be resolved without the need for presentation of oral argument. However, the State requests to present oral argument should this Court determine that it would be helpful.

## Statement of the Case

A Tarrant County jury convicted Appellant of sexual assault as alleged in count one of the indictment.[1] CR 1: 175; RR 4: 123. It also affirmatively answered the submitted special issue statutorily enhancing the sexual-assault conviction from a second-degree felony to a first-degree felony under section 22.011(f) of the Texas Penal Code. CR 1: 7, 175; RR 4: 124. The jury sentenced Appellant to confinement for life for sexual assault. CR 1: 184; RR 5: 94.

[1] Appellant's conviction and twenty-year sentence for prohibited sexual conduct are not at issue here. CR 1: 176, 186; RR 4: 124; RR 5: 94.

## Statement of Procedural History

Appellant raised four points of error in the Court of Appeals for the Second District of Texas, including a challenge to the sufficiency of the evidence to trigger the enhancement provisions of section 22.011(f). *Senn v. State (Senn I)*, 551 S.W.3d 172, 175 (Tex. App.—Fort Worth 2017), *vacated & remanded*, No. PD-0145-17, 2017 WL 5622955 (Tex. Crim. App. November 22, 2017) (per curiam) (not designated for publication). The court affirmed the trial court's judgment. *Id*. This Court granted Appellant's petition for discretionary review. *State v. Senn (Senn II)*, No. PD-0145-17, 2017 WL 5622955 (Tex. Crim. App. November 22, 2017) (per curiam) (not designated for publication). It vacated the court of appeals' judgment in *Senn I* and remanded the cause because the lower court did not have the benefit of the subsequent opinion in *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017). *Senn II*, No. PD-0145-17, slip op. at 2, 2017 WL 5622955 at *1.

On remand, the court of appeals found the evidence insufficient to trigger section 22.011(f)'s enhancement provision. *Senn v. State (Senn III)*, No. 02-15-00201-CR, slip op. at 9, 2018 WL 2248673 at *4 (Tex. App.—Fort Worth May 17, 2018), *withdrawn on reh'g*, ___ S.W.3d ___, No. 02-15-00201-CR, 2018 WL 5291889 (Tex. App.—Fort Worth October 25, 2018, pet. filed). As a result, the court modified the trial court's judgment to reflect a conviction for the second-degree-

felony offense of sexual assault, reversed the trial court's judgment on the sexual-assault case as to punishment, and remanded the sexual-assault case to the trial court for a new trial on punishment only. *Id*.

On June 1, 2018, the State filed a motion for rehearing and a motion for rehearing en banc. On October 25, 2018, a majority of the court of appeals' panel denied the State's motion for rehearing, withdrew its prior opinion, and substituted its new published opinion and judgment. *Senn v. State (Senn IV)*, ___ S.W.3d ___, No. 02-15-00201-CR, slip op. at 3, 2018 WL 5291889 at *1 (Tex. App.—Fort Worth October 25, 2018, pet. filed) (op. on remand & on reh'g).[2] The court again sustained Appellant's first point of error, modified the trial court's judgment on Appellant's sexual-assault charge to reflect a conviction for a second-degree felony, reversed the trial court's judgment for sexual assault as to punishment, and remanded the sexual-assault case to the trial court for a new trial on punishment. *Id*. at 4-5, 2018 WL 5291889 at *2. The majority opinion concluded that, for the section 22.011(f) enhancement to apply, the State was required to prove facts constituting one of the six bigamy prohibitions set forth in section 25.01 of the Texas Penal Code (*i.e.*, that Appellant "took, attempted, or intended to take any action involving marrying or

[2] The court of appeals' majority opinion in *Senn IV* is attached hereto as Appendix A; the dissenting opinion is attached as Appendix B.

claiming to marry [BS] or living with [BS] under the appearance of being married"). *Id*. at 14, 2018 WL 5291889 at *5-6. Contrary to the majority's reasoning, Justice Gabriel concluded in her dissenting opinion that the State's proof that Appellant sexually assaulted BS and that he was married to someone else at the time of the assault was sufficient to invoke the enhancement provisions of section 22.011(f).[3] *Senn IV*, No. 02-15-00201-CR, slip op. at 5-6, 2018 WL 5291889 at *8 (Gabriel, J., dissenting op. on remand & on reh'g).

## Statement of Facts

In short, Appellant sexually assaulted and impregnated his biological daughter BS while he was married to RS. *Senn IV*, No. 02-15-00201-CR, slip op. at 3, 2018 WL 5291889 at *1. BS has an IQ of 64 and has been diagnosed with mild intellectual disability and attention deficit hyperactivity disorder. RR 3: 44, 66, 115, 135; RR 4: 21.

In January 2011, eighteen-year-old BS moved in with Appellant, her stepmother RS, and her two younger siblings. RR 3: 68-69, 87, 91, 117, 134. One night in May 2011, Appellant entered the bedroom where BS, his younger daughter,

[3] The majority, on the other hand, concluded that "[e]vidence of the sexual assault and of [Appellant's] marriage license to [BS's] step-mother, standing alone, do not amount to facts constituting one of the six bigamy prohibitions under section 25.01." *Senn IV*, No. 02-15-00201-CR, slip op. at 14, 2018 WL 5291889 at *6.

and his best friend's daughter were sleeping. RR 3: 118-19. Appellant smelled like beer. RR 3: 119. He told BS "to get out of bed, clothes off, and on hands and knees." RR 3: 119. BS complied by undressing and getting on her hands and knees. RR 3: 120-22. Appellant then "put his private part into [hers]." RR 3: 122, 130, 142. BS did not know that what Appellant was doing to her was sex, and she did not know that someone could have a baby from having sex. RR 3: 123. When Appellant finished, he left the room, and BS returned to bed. RR 3: 123.

As a result of the sexual assault, BS became pregnant with Appellant's child. RR 3: 123, 145, 167-68, 171. She continued living with Appellant until she gave birth to a baby girl on January 14, 2012. RR 3: 78; RR 6: St. Ex. 4. Based on conversations with doctors and nurses, BS's great aunt KG was concerned about BS going home from the hospital with Appellant. RR 3: 79. BS went home with KG because there was no other safe place for her to go, and she never returned to Appellant's house. RR 3: 80, 128; RR 4: 33. BS gave the baby up for adoption before Valentine's Day because she wanted the baby to have a better life than she had. RR 3: 129.

BS eventually told KG about Appellant sexually assaulting her, and they reported the crime to the police on February 16, 2012. RR 3: 22-23, 26-27, 81, 138. While Appellant was in jail awaiting trial, his sister visited him to inform him that

his wife RS was hospitalized with a brain tumor. RR 4: 37. She confronted him about what she thought had happened regarding BS. RR 4: 33-34. After avoiding the question three times, Appellant finally responded: "If you want it and the girl doesn't say, 'No,' so you do it anyway, that's not rape is it?" RR 4: 34.

## Grounds for Review

1. The court of appeals erred in concluding that section 22.011(f) of the Texas Penal Code requires the State to prove commission of an actual bigamy offense to elevate Appellant's punishment range for sexual assault to a first-degree felony offense.

2. The court of appeals' decision requiring the State to prove an actual bigamy offense under section 22.011(f) of the Texas Penal Code is contrary to *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017).

3. The court of appeals erred in disregarding the clarification contained in footnote 9 of *Arteaga* merely because it was relegated to a footnote.

## Arguments and Authorities

### I. Applicable Law

#### A. Statutory Provisions

Sexual assault is generally a second-degree felony. *See* TEX. PENAL CODE § 22.011(f). The offense is a first-degree felony "if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section

25.01 [of the Texas Penal Code]." *Id*. Section 25.01 defines the offense of bigamy in relevant part as follows:

> (a) An individual commits an offense if:
>
> (1) he is legally married and he:
>
> (A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or
>
> (B) lives with a person other than his spouse in this state under the appearance of being married; or
>
> (2) he knows that a married person other than his spouse is married and he:
>
> (A) purports to marry or does marry that person in this state, or any other state or foreign country, under circumstances that would, but for the person's prior marriage, constitute a marriage; or
>
> (B) lives with that person in this state under the appearance of being married.
>
> (b) For purposes of this section, "under the appearance of being married" means holding out that the parties are married with cohabitation and an intent to be married by either party.

TEX. PENAL CODE § 25.01.

### B. *Arteaga v. State*

In *Arteaga*, the State argued that Arteaga's sexual assault of his biological daughter should be enhanced to a first-degree felony under section 22.011(f) of the Texas Penal Code because he was "prohibited from marrying" his biological

daughter. 521 S.W.3d at 331-32. The abstract portion of the trial court's charge included the language of section 6.201 of the Texas Family Code, which defines when a marriage is void based on consanguity. *Id*. at 332-34; *see* TEX. FAM. CODE § 6.201. Arteaga alleged that the State was confined to proving he was "prohibited from marrying his daughter" under the terms of the bigamy statute and could not rely on the consanguity provisions of the Texas Family Code. *Arteaga*, 521 S.W.3d at 332; *see* TEX. PENAL CODE § 25.01 (defining offense of bigamy). A majority of this Court initially addressed Arteaga's argument by reviewing whether the phrase "under [s]ection 25.01" at the end of section 22.011(f) modifies only the second section of section 22.011(f) (*i.e.*, the "living under the appearance of being married" section) or also modifies the first section (*i.e.*, the "marrying" and "purporting to marry" section). *Arteaga*, 521 S.W.3d at 335-36. The majority of this Court held that an ambiguity exists and resolved it as follows:

> We, however, conclude that the State is required to prove facts constituting bigamy under all three provisions of 22.011(f), that is, when the defendant was prohibited from (1) marrying the victim or (2) claiming to marry the victim, and when the defendant was prohibited from (3) living with the victim under the appearance of being married.

*Id*. at 335 (footnote omitted). Footnote 9, which immediately followed this holding, provided the following guidance about what the State must prove to satisfy its burden:

> When we discuss "facts that *would* constitute bigamy," we do not mean that the State has to prove that the defendant committed the offenses of sexual assault and bigamy. What we mean is that, to elevate second-degree felony sexual assault to first-degree felony sexual assault under Section 22.011(f), the State must prove that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he *would* be guilty of bigamy.

*Id*. at 335 n.9 (emphasis in original).

In a concurring opinion, Judge Yeary relied heavily on footnote 9 in deciding to join the Court's majority opinion:

> In a footnote, the Court explains that it means only to recognize a requirement that, in order to invoke Section 22.011(f), the State must prove that, *if* the actor were to actually marry or purport to marry his victim, or to live with his victim under the appearance of being married, then he would commit the offense of bigamy. Majority Opinion at 10 n.9. But the State need not "prove facts constituting bigamy" in the sense that it must prove the actor *actually* committed bigamy. In light of this explanation, I join the Court's opinion.

*Id*. at 341 (Yeary, J., concurring) (emphasis in original). After offering a well-reasoned analysis of why section 22.011(f) would never require the State to prove facts that the actor actually committed bigamy, Judge Yeary again referred to the majority opinion's footnote 9: "Though to my mind some of the language in the text of the Court's opinion remains ambiguous, the Court's clarification in footnote 9 satisfies me that the Court's understanding is the same as my own." *Id*. at 341-44.

## II. The Trial Court's Charge and the Jury's Findings

In addition to instructing the jury on the offense of sexual assault alleged in count one of the indictment, the trial court's charge included the following special issue tracking section 22.011(f) of the Texas Penal Code:

> Do you find beyond a reasonable doubt that at the time the offense of sexual assault, as set out above, was committed, [BS] was a person whom [Appellant] was prohibited from marrying or purporting to marry or with whom [Appellant] was prohibited from living under the appearance of being married?

CR 1: 171-72, 175; *see* TEX. PENAL CODE § 22.011(f). The jury responded affirmatively, thus making the sexual-assault offense a first-degree felony and increasing the punishment range to confinement for five to ninety-nine years or life. CR 1: 175, 180; *see* TEX. PENAL CODE §§ 12.32(a), 22.011(f). The jury sentenced Appellant to confinement for life. CR 1: 184; RR 5: 94.

## III. The Evidence Is Sufficient to Convict Appellant of First-Degree Sexual Assault Pursuant to TEX. PENAL CODE § 22.011(f)

The linchpin of Appellant's argument on appeal has been that convicting him of first-degree sexual assault under section 22.011(f) requires the State to prove that he was *actually* committing a bigamy offense under section 25.01 with BS at the time he sexually assaulted her. The State's position throughout has been that no such proof was required, a position which is now supported by this Court's decision in *Arteaga*.

### A. The Court of Appeals' Majority Opinion Misinterprets *Arteaga*

The court of appeals' majority opinion relied heavily on what it perceived to be an inconsistency between certain language in the body of the *Arteaga* majority opinion and footnote 9. *See Senn IV*, No. 02-15-00201-CR, slip op. at 8-11, 2018 WL 5291889 at *3-4. The court of appeals' majority opinion notes:

> After arduous study, we are unable to reconcile footnote 9's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts that would constitute bigamy—with the *Arteaga* opinion's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts constituting bigamy.

*Id*. at 9, 2018 WL 5291889 at *4.[4] The majority notes that the "facts that would constitute bigamy" language in footnote 9 is not used in the sentence immediately preceding footnote 9, but in a prior sentence summarizing the lower court's holding. *See id*. at 9-10, 2018 WL 5291889 at *4. Logically, footnote 9 must be interpreted as clarifying the sentence immediately preceding it. *See Arteaga*, 521 S.W.3d at 335 & n.9. Moreover, the use of "we" in footnote 9 can only be interpreted as referring to the judges joining the majority *Arteaga* opinion, not to the lower court justices. *See id*. Finally, Judge Yeary's discussion of footnote 9 in his concurring opinion, as previously set forth herein, supports the State's interpretation of footnote 9 as

[4] Such an inconsistency, standing alone, is reason enough for this Court to grant the State's petition for discretionary review in order to clarify *Arteaga*.

allowing Appellant's conviction of first-degree sexual assault in this case. *See id*. at 341-44 (Yeary, J., concurring).

Rather than recognize that footnote 9 in *Arteaga* is a clarifying footnote, the lower court's majority opinion instead turns to this Court's prior pronouncements that it is not constrained to follow its own footnotes. *See Senn IV*, No. 02-15-00201-CR, slip op. at 11, 2018 WL 5291889 at *5. However, this Court has never stated that its footnotes should be disregarded as meaningless. Justice Gabriel correctly identified the error in the majority's reasoning as follows:

> But I disagree with the majority to the extent its choice is based on the location of the "would have constituted" holding in the court of criminal appeals' opinion. The court of criminal appeals has held that it is not constrained to follow its own footnotes, but it has recognized that it is bound by footnotes authored by the United States Supreme Court. *See Gonzales v. State*, 435 S.W.3d 801, 813 n.11 (Tex. Crim. App. 2014) (stating *in a footnote* that although it is not "bound" by its footnote holdings, it is bound by Supreme Court holdings contained in footnotes). As the court of criminal appeals is bound by the court tasked with the discretionary review of its opinions, we also should be bound by the court of criminal appeals' similar directives to us. Further, the court of criminal appeals frequently relies on its own footnotes, weakening its prior pronouncements that footnotes have minimal precedential value. *See, e.g.*, *Estes v. State*, 546 S.W.3d 691, 699 & n.50 (Tex. Crim. App. 2018) (quoting *Arteaga*, 521 S.W.3d at 335 n.9 for that opinion's holding); *McClintock v. State*, 444 S.W.3d 15, 20 & n.20 (Tex. Crim. App. 2014) (citing *State v. Gobert*, 275 S.W.3d 888, 891-92 n.12 (Tex. Crim. App. 2009) as support for what the court previously "held"); *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999) (citing *Boykin v. State*, 818 S.W.2d 782, 785-86 & 786 n.4 (Tex. Crim. App. 1991) to support legal holding). *See generally Gonzales*, 435 S.W.3d at 813 n.11 ("Finally, it is not clear how much precedential

> value a pronouncement delivered by this Court in a footnote should carry, considering that we have stated [in a footnote] that footnotes 'should receive minimal precedential value.'") (quoting *Young v. State*, 826 S.W.2d 141, 144 n.5 (Tex. Crim. App. 1991)). Disregarding the placement of a court of criminal appeals' holding—in the text or in a footnote—seems appropriate especially because the court of criminal appeals recently and routinely began placing all of its supporting citations in footnotes. *See, e.g.*, *Beham v. State*, No. PD-0638-17, ___ S.W.3d ___, ___, 2018 WL 4344389, at *1–7 (Tex. Crim. App. Sept. 12, 2018); *White v. State*, 549 S.W.3d 146, 147–58 (Tex. Crim. App. 2018).

*Senn IV*, No. 02-15-00201-CR, slip op. at 3-4, 2018 WL 5291889 at *7 (Gabriel, J., dissenting op. on remand & on reh'g) (emphasis in original).

Additionally, the majority opinion below relies too heavily on this Court's use and placement of the "facts constituting bigamy" versus "would constitute bigamy" language throughout the *Arteaga* opinion. *See Senn IV*, No. 02-15-00201-CR, slip op. at 10, 2018 WL 5291889 at *4. Frankly, the lower court's majority opinion appears to draw a distinction between "facts constituting bigamy" and "would constitute bigamy" where none was intended. A reading of *Arteaga* as a whole, including footnote 9, shows that this Court likely used the phrases interchangeably without intending them to convey a significantly different meaning. As Justice Gabriel correctly explained in her dissenting opinion below:

> In any event, the court of criminal appeals did not stop at its "facts constituting bigamy" holding in the text. In *Arteaga*, Judge Kevin Yeary filed a concurring opinion that addressed the inconsistency between the text and footnote 9 and posited that the correct holding was

> that "the State need not 'prove facts constituting bigamy' in the sense that it must prove the actor *actually* committed bigamy." 521 S.W.3d at 341 (Yeary, J., concurring). Indeed, he concluded that because footnote 9 clarified the court's holding that the facts need only show bigamy would have been committed if the perpetrator were to marry the victim, he was "satisfie[d] . . . that the Court's understanding [was] the same as [his] own." *Id.* at 344. The *Arteaga* majority did not respond to Judge Yeary's stated understanding of its holding.
>
> Almost a year after *Arteaga*, the court of criminal appeals again addressed the sexual-assault enhancement in *Estes*. 546 S.W.3d at 699-702. The *Estes* court relied on *Arteaga* and began its analysis of section 22.011(f)—the sexual-assault enhancement—by summarizing the *Arteaga* holding to be that as stated in footnote 9: "We have interpreted Section 22.011(f) as essentially requiring proof 'that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy.'" *Id.* at 699 & n.50 (quoting *Arteaga*, 521 S.W.3d at 335 n.9). Therefore, the court of criminal appeals recognized that its holding in *Arteaga* required the State to establish that the alleged offense would constitute bigamy if the victim and the perpetrator were married or held themselves out to be married, not that bigamy was actually committed.

*Senn IV*, No. 02-15-00201-CR, slip op. at 4-5, 2018 WL 5291889 at *8 (Gabriel, J., dissenting op. on remand & on reh'g) (emphasis in original).

### B. The State Met Its Burden Under TEX. PENAL CODE § 22.011(f)

The court of appeals majority erred in concluding that *Arteaga* required it to do anything other than affirm the trial court's judgment. Application of section 22.011(f) in *Arteaga* relied solely on the biological relationship of the unmarried Arteaga to the victim. *See Arteaga*, 521 S.W.3d at 331-32. Here, the State did not rely solely on the biological relationship between Appellant and BS to invoke the

applicability of section 22.011(f). The State also presented unequivocal evidence that Appellant was married to RS when he sexually assaulted BS. RR 3: 91-93, 117, 189; RR 6: St. Ex. 2. At the time Appellant sexually assaulted BS, there can be no doubt that, *if* Appellant were to marry or claim to marry BS or to live with BS under the appearance of being married, he *would* be guilty of bigamy. *See* TEX. PENAL CODE § 25.01. This is the very factual scenario that *Arteaga* approved as meeting the requirements of section 22.011(f). *See Arteaga*, 521 S.W.3d at 335 n.9; *see also id*. at 341, 344 (Yeary, J., concurring); *Senn IV*, No. 02-15-00201-CR, slip op. at 2, 5-6, 2018 WL 5291889 at *7-8 (Gabriel, J., dissenting op. on remand & on reh'g). As Justice Gabriel stated in her dissenting opinion, this Court "has twice stated that the State need only introduce evidence showing that the defendant would have been guilty of bigamy if he were to marry or claim to marry his victim," and the State "met its burden of proof regarding the enhancement allegation." *Senn IV*, No. 02-15-00201-CR, slip op. at 2, 2018 WL 5291889 at *7 (Gabriel, J., dissenting op. on remand & on reh'g).

## Conclusion

*Arteaga* does not require the State to prove an actual bigamy offense; rather, the State must prove facts which *would* constitute an offense. The evidence is sufficient to trigger the statutory enhancement of Appellant's sexual-assault offense

under section 22.011(f) of the Texas Penal Code because the State proved unequivocally that Appellant was married to RS when he sexually assaulted BS. Therefore, the court of appeals majority erred in modifying the trial court's judgment to reflect a conviction for a second-degree felony offense of sexual assault and remanding the cause for a new punishment trial.

## Prayer for Relief

The State prays that this Court grant its petition for discretionary review, hold that the court of appeals majority erred in modifying the trial court's judgment and remanding the cause for a new punishment trial, and affirm the trial court's judgment.

Respectfully submitted,

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## Certificate of Compliance

The total number of words in this State's Petition for Discretionary Review, exclusive of the matters allowed to be omitted, is 3,205 words as determined by the word count feature of Microsoft Office Word 2016.

/s/ Helena F. Faulkner
HELENA F. FAULKNER

## Certificate of Service

A true copy of the State's Petition for Discretionary Review has been e-served on Appellant's counsel, William R. Biggs, wbiggs@williambiggslaw.com, and on the Stacey M. Soule, State Prosecuting Attorney, information@spa.tex.gov, on December 21, 2018.

/s/ Helena F. Faulkner
HELENA F. FAULKNER

# APPENDIX A


# In the
# Court of Appeals
# Second Appellate District of Texas
# at Fort Worth

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No. 02-15-00201-CR

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MICHAEL RAY SENN, Appellant

v.

THE STATE OF TEXAS

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On Appeal from the 213th District Court
Tarrant County, Texas
Trial Court No. 1308222R

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Before Walker, Meier, and Gabriel, JJ.
Opinion on Remand and on Rehearing by Justice Walker
Dissenting Opinion on Remand and on Rehearing by Justice Gabriel

## OPINION ON REMAND AND ON REHEARING

On May 17, 2018, we issued an opinion on remand applying the holding from *Arteaga v. State*, 521 S.W.3d 329, 336 (Tex. Crim. App. 2017)—that "[t]he legislature intended for the State to prove facts constituting bigamy whenever it alleges that the defendant committed sexual assault, *and* the State invokes [s]ection 22.011(f)" of the Texas Penal Code—as we were instructed to do by the Texas Court of Criminal Appeals. *See Senn v. State* (*Senn III*), No. 02-15-00201-CR, 2018 WL 2248673, at *2 (Tex. App.—Fort Worth May 17, 2018, no pet. h.) (op. on remand); *State v. Senn* (*Senn II*), No. PD-0145-17, 2017 WL 5622955, at *1 (Tex. Crim. App. Nov. 22, 2017) (not designated for publication) (remanding case to this court because we "did not have the benefit of [the court of criminal appeals's] opinion in *Arteaga*" and stating that it held in *Arteaga* that under section 22.011(f), "the [l]egislature 'intended for the State to prove facts constituting bigamy'"). Following our opinion on remand, the State filed a motion for rehearing. The State asserted that we had erred by concluding that section 22.011(f) required the State to prove facts constituting bigamy when it alleged that Senn committed sexual assault and the State invoked section 22.011(f) of the penal code to elevate Senn's punishment range for sexual assault to a first-degree felony offense. Relying on a footnote in the court of criminal appeals's opinion in *Arteaga*, as well as Judge Yeary's concurring opinion, the State argued that it was required to prove only "that, if he [Senn] were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he *would* be

guilty of bigamy." We deny the State's motion for rehearing but withdraw our prior opinion and judgment dated May 17, 2018, and substitute in their places this opinion and judgment to clarify our prior holding.

## I. INTRODUCTION

As set forth in our opinion on original submission, Senn sexually assaulted and impregnated his biological daughter Brenda[1] while he was married to her step-mother. A jury convicted Senn of prohibited sexual conduct, for which he was sentenced to twenty years' imprisonment,[2] and of sexual assault, for which he was sentenced to life imprisonment after the jury affirmatively answered a special issue statutorily enhancing his sexual assault conviction from a second-degree felony to a first-degree felony under section 22.011(f). *See* Tex. Penal Code Ann. § 22.011(f) (West Supp. 2018), § 25.02(a)(1), (c) (West 2011). After addressing Senn's four issues—challenging the sufficiency of the evidence to trigger the enhancement, the constitutionality of section 22.011(f) as applied to him, and the absence of a bigamy instruction from the jury charge—we affirmed both of his convictions. *See Senn v. State* (*Senn I*), 551

[1]To protect the anonymity of the victim, we use a pseudonym. *See McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982).

[2]Senn's notice of appeal states that he is appealing "from the judgments heretofore rendered against him," but he does not raise any issue on appeal related to his prohibited-sexual-conduct conviction.

S.W.3d 172, 183 (Tex. App.—Fort Worth 2017),[3] *vacated*, *Senn II*, 2017 WL 5622955, at *1.

In a per curiam opinion, the court of criminal appeals vacated our judgment and remanded this case to us because we did not have the benefit of its subsequent opinion in *Arteaga*, which construed for the first time the enhancement provision in section 22.011(f) in the context of jury-charge error. *See Senn II*, 2017 WL 5622955, at *1. After applying *Arteaga*'s holding—that "[t]he legislature intended for the State to prove facts constituting bigamy whenever it alleges that the defendant committed sexual assault, *and* the State invokes [s]ection 22.011(f)"—to the facts here, we hold that the evidence is insufficient to trigger the statutory enhancement of Senn's sexual assault charge. Accordingly, we will affirm Senn's unchallenged conviction for prohibited sexual conduct, modify the trial court's judgment on the sexual assault to reflect a conviction for a second-degree felony, reverse the judgment on the sexual

[3]In *Senn I*, we held that "[t]he State was therefore not required to show that Senn was engaged in a bigamous relationship with Brenda under section 25.01 in order to trigger application of penal code section 22.011(f)'s enhancement provision." *Id.* at 178. We reached this holding after conducting a statutory-construction analysis and concluding that the phrase in section 22.011(f)—"prohibited from marrying"—is not tied to section 22.011(f)'s phrase—"under section 25.01." The court of criminal appeals rejected this statutory-construction analysis in *Arteaga*. *See* 531 S.W.3d at 335–37.

assault as to punishment, and remand the sexual assault case for a new trial on punishment.[4]

## II. THE EVIDENCE IS INSUFFICIENT TO TRIGGER THE STATUTORY ENHANCEMENT

### A. The Statutory Provisions at Issue

Section 22.011(f) enhances the offense of sexual assault from a second-degree felony to a first-degree felony "if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under [s]ection 25.01." Tex. Penal Code Ann. § 22.011(f). Section 25.01 (the bigamy statute) states,

> (a) An individual commits an offense if:
>
> > (1) he is legally married and he:
> >
> > > (A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or
> >
> > > (B) lives with a person other than his spouse in this state under the appearance of being married; or
> >
> > (2) he knows that a married person other than his spouse is married and he:
> >
> > > (A) purports to marry or does marry that person in this state, or any other state or foreign country, under

[4]Because Senn does not challenge the sufficiency of the evidence to support the elements of sexual assault as a second-degree felony, we omit a detailed factual and procedural background.

> circumstances that would, but for the person's prior marriage, constitute a marriage; or
>
> (B) lives with that person in this state under the appearance of being married.

*Id.* § 25.01 (West Supp. 2018).

### B. The Parties' Positions

In his first issue, Senn argues that the evidence is insufficient to the trigger the statutory enhancement under section 22.011(f) because there is no evidence that he was engaged in a bigamous relationship with Brenda. On rehearing of our opinion on remand, the State contends that the evidence necessary to trigger the statutory enhancement under section 22.011(f) is proof that "if he [Senn] were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he *would* be guilty of bigamy."

### C. Under *Arteaga*, What Evidentiary Burden Does the State Bear to Trigger the Enhancement Under Section 22.011(f)?

Before we conduct a sufficiency analysis of the evidence to support enhancement of Senn's conviction under section 22.011(f), we must first determine exactly what the State was required to prove to attain enhancement of Senn's conviction under section 22.011(f). This was the very question the Texas Court of Criminal Appeals told us it had answered in *Arteaga*.

The court of criminal appeals in *Arteaga* set forth the issue—the same issue presented to this court by the State's motion for rehearing—followed by the various interpretations of section 22.011(f):

> [W]hat does the State have to prove when it invokes [s]ection 22.011(f) of the sexual-assault statute, which incorporates the bigamy statute, to elevate sexual assault from a second-degree felony to a first-degree felony?[5]
>
> The State argues that [s]ection 22.011(f) requires proof under the bigamy statute only when the victim is a person who[m] the defendant is prohibited from living with under the appearance of being married. The court of appeals reached a "middle ground," deciding that the State is required to prove facts that would constitute bigamy under [s]ection 25.01 when the victim is a person that (1) the defendant was prohibited from claiming to marry *or* (2) when the victim was someone who[m] the defendant was prohibited from living [with] under the appearance of being married. We, however, conclude that the State is required to prove facts constituting bigamy [under section 25.01][6] under all three provisions of 22.011(f), that is, when the defendant was prohibited from (1) marrying the victim or (2) claiming to marry the victim, and when the defendant was prohibited from (3) living with the victim under the appearance of being married.

521 S.W.3d at 335.

This section of the *Arteaga* opinion is immediately followed by footnote 9, which is relied on by the State in its motion for rehearing:

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[5]The dissent relies partially upon *Estes v. State*, 546 S.W.3d 691, 699 & n.50 (Tex. Crim. App. 2018). The issue addressed in *Estes*, however, was an as-applied constitutional challenge to section 22.011(f), not a challenge to the sufficiency of the evidence produced to support enhancement of a conviction under section 22.011(f) as in this appeal.

[6]Throughout the *Arteaga* opinion, the court of criminal appeals makes clear that the three prohibitions in section 22.011(f) must be interpreted in conjunction with the bigamy statute—Texas Penal Code section 25.01. 521 S.W.3d at 339 (stating that "it was the State's responsibility to prove that Arteaga was 'prohibited from marrying the victim . . . *under [s]ection 25.01*'") (emphasis added); *see also id.* at 338 ("As we have explained, however, *the bigamy statute* defines when a person is prohibited from marrying another for purposes of 22.011(f), not the [f]amily [c]ode.") (emphasis added). We therefore insert the omitted words to provide additional clarity.

> When we discuss "facts that *would* constitute bigamy," we do not mean that the State has to prove that the defendant committed the offenses of sexual assault and bigamy. What we mean is that, to elevate second-degree felony sexual assault to first-degree felony sexual assault under [s]ection 22.011(f), the State must prove that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy.

*Id.* at 335 n.9.

The court of criminal appeals in the body of its *Arteaga* opinion then concluded that the legislature drafted section 22.011(f) using the modifying phrase "prohibited from" to incorporate all six bigamy prohibitions from section 25.01: (1) marriage is prohibited if a person does marry a person other than his spouse; (2) marriage is prohibited if a person does marry someone whom he knows is already married; (3) a person is prohibited from claiming to marry a person other than his spouse; (4) a person is prohibited from claiming to marry a person whom he knows is already married; (5) a person is prohibited from living under the appearance of being married with a person other than his spouse; and (6) a person is prohibited from living under the appearance of being married with a person whom he knows is already married. *See id.* at 336 (citing section 25.01(a)(1)(A), (a)(1)(B), (a)(2)(A), (a)(2)(B)). The court of criminal appeals held that the legislature intended for the State to prove *facts constituting bigamy* under one of the six bigamy prohibitions enumerated above whenever it alleges that the defendant committed sexual assault and it invokes section 22.011(f). *See id.* In support of its holding, the court of criminal appeals recognized the polygamy purposes underlying the enactment of section 22.011(f) and further recognized that, in

cases such as this in which the victim has been sexually abused by a family member, statutory protection already exists as found in Texas Penal Code section 25.02. *See id.* at 337 (citing section 25.02, which prohibits sex between family members). And in remanding this case to us, the court of criminal appeals summarized its *Arteaga*[7] holdings as follows:

> We recently handed down our opinion in *Arteaga v. State*, [citation omitted] in which we held that under § 22.011(f), the [l]egislature "intended for the State to prove facts constituting bigamy." We also held that the jury charge in that case was erroneous because it neglected to include the definition of bigamy from § 25.01.

*Senn II*, 2017 WL 5622955, at *1.

After arduous study, we are unable to reconcile footnote 9's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts that would constitute bigamy—with the *Arteaga* opinion's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts constituting bigamy. The State on rehearing contends that footnote 9's standard applies; Senn argues that the State was required to prove facts constituting bigamy. Examining footnote 9, we note that the "would constitute

[7] *Arteaga* involved jury-charge error, but the analysis also governs the sufficiency challenge here because we are required to compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial, and *Arteaga* set forth what must be included in a hypothetically correct jury charge for the statutory enhancement at issue here. *See Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). Consequently, although in *Senn I* we analyzed section 22.011(f) without regard to section 25.01, we now apply the *Arteaga* analysis incorporating section 25.01. *See Arteaga*, 521 S.W.3d at 336–38; *Senn I*, 2017 WL 117306, at *1–3.

bigamy" language referenced by footnote 9 is not used in the sentence immediately preceding the footnote, which sets forth the court's holding, but rather is used in a prior sentence that summarizes the court of appeals's holding. *See Arteaga*, 521 S.W.3d at 335. And although the body of the *Arteaga* opinion uses the "would constitute bigamy" language five times in its statutory construction analysis comparing section 22.011(f) to section 25.01, the court of criminal appeals ultimately concludes its statutory construction analysis with a holding using the "facts constituting bigamy" language, as follows:

> When the two statutes are considered in light of each other, the grammatical ambiguity in [s]ection 22.011(f) is clarified: **The legislature intended for the State to prove facts constituting bigamy** whenever it alleges that the defendant committed sexual assault, *and* the State invokes [s]ection 22.011(f).

*Id.* at 335–36 (bolded emphasis added). Throughout the *Arteaga* opinion, each time the holding is referenced, the court of criminal appeals does not use the "would constitute bigamy" language but instead utilizes the "facts constituting bigamy" language. *See id.* at 335 ("We, however, conclude that the State is required to prove *facts constituting bigamy* under all three provisions of 22.011(f), that is, when the defendant was prohibited from (1) marrying the victim or (2) claiming to marry the victim, and when the defendant was prohibited from (3) living with the victim under the appearance of being married.") (emphasis added), 336 ("The legislature intended for the State to prove *facts constituting bigamy* whenever it alleges that the defendant committed sexual assault, *and* the State invokes [s]ection 22.011(f).") (emphasis

added). Nor is the "would constitute bigamy" language contained in the court of criminal appeals's opinion remanding this case to us; that opinion also utilizes the "facts constituting bigamy" language. *See Senn II*, 2017 WL 5622955, at *1 ("We recently handed down our opinion in *Arteaga v. State*, [citation omitted] in which we held that under § 22.011(f), the [l]egislature 'intended for the State to prove *facts constituting bigamy*.'") (emphasis added).

The court of criminal appeals has previously instructed that footnotes and concurring opinions are not precedential. *See Gonzales v. State*, 435 S.W.3d 801, 813 n.11 (Tex. Crim. App. 2014) ("We agree that we have intimated that we are not bound by holdings expressed in the footnotes of our own opinions."); *Young v. State*, 826 S.W.2d 141, 144 n.5 (Tex. Crim. App. 1991) (stating that footnotes should receive minimal precedential value); *see also Unkart v. State*, 400 S.W.3d 94, 101 (Tex. Crim. App. 2013) (stating that concurring opinions have only persuasive value); *Schultz v. State*, 923 S.W.2d 1, 3 n.2 (Tex. Crim. App. 1996) ("As a concurring opinion, *Lugo-Lugo* is not binding precedent."). For this reason, and also because we are constrained to follow the instructions given to us on remand by the court of criminal appeals, we decline the State's request on rehearing urging us to apply the "would constitute bigamy" language in our sufficiency analysis.[8] *See Senn II*, 2017 WL 5622955, at *1

[8]The dissent asserts that we are bound by *Arteaga*'s footnote 9. This may be so. But we are undisputedly bound by the court of criminal appeals's stated holding in the *Arteaga* opinion. And we are undisputedly bound by the court of criminal appeals's opinion remanding this case to us in light of *Arteaga* and stating that in *Arteaga* it had held "the [l]egislature 'intended for the State to prove facts constituting bigamy.'" *See*

(remanding case to this court because we "did not have the benefit of [the court of criminal appeals's] opinion in *Arteaga*" and stating that it had held in *Arteaga* that under section 22.011(f), "the [l]egislature 'intended for the State to prove facts constituting bigamy'"); *see also Senn II* mandate, Texas Court of Criminal Appeals, http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=c78d3ae4-9601-aa1-af87-8ba4242f7e25&coa=coscca&DT=MANDATE%20ISSD&MediaID=cd646b38-e360-436c-bcb6-611407c7aa66 (commanding us to "observe the order of our said Court of Criminal Appeals in this behalf and in all things to have it duly recognized, obeyed[,] and executed") (omitted use of bolded all caps). We apply the same sufficiency standard that we applied in our original opinion on remand. *See Senn III*, 2018 WL 2248673, at *2.

### D. Standard of Review

In our due-process review of the sufficiency of the evidence, we view all of the evidence in the light most favorable to the jury's answer to the special issue to determine whether any rational trier of fact could have found the essential elements of the special issue beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Gale v. State*, 998 S.W.2d 221, 224 (Tex. Crim. App. 1999); *Stewart v. State*, 350 S.W.3d 750, 755 (Tex. App.—Amarillo 2011, pet. ref'd).

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*Senn II*, 2017 WL 5622955, at *1. Therefore, here, we are compelled to apply that undisputedly binding precedent and not footnote 9.

To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, we compare the elements of the special issue as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Cf. Jenkins*, 493 S.W.3d at 599; *Crabtree v. State*, 389 S.W.3d 820, 824 (Tex. Crim. App. 2012) ("The essential elements of the crime are determined by state law."). A hypothetically correct jury charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Jenkins*, 493 S.W.3d at 599. The law as authorized by the indictment means the statutory elements of the special issue as modified by the factual details and legal theories contained in the charging instrument. *Cf. id.*

### E. Applying *Arteaga* to These Facts

Pursuant to the court of criminal appeals's holding in *Arteaga*, the State was required to prove facts constituting bigamy to enhance Senn's second-degree felony sexual assault to first-degree felony sexual assault. *See* 521 S.W.3d at 336 (stating "[t]he legislature intended for the State to prove facts constituting bigamy whenever . . . the State invokes [s]ection 22.011(f)"), *id.* at 339 ("[I]t was the State's responsibility to prove that Arteaga was 'prohibited from marrying the victim . . . under [s]ection 25.01.'"); *see also Estes*, 546 S.W.3d at 699 (quoting *Arteaga*'s holding). This does not mean that the State was required to indict Senn for bigamy, nor does it require the State to obtain a predicate finding of bigamy in order to trigger the

enhancement under section 22.011(f). Instead, a hypothetically correct jury charge requires the State to prove that Senn was "prohibited from marrying the victim . . . *under [s]ection 25.01*." *See Arteaga*, 521 S.W.3d at 339 (emphasis added). Thus, to trigger the enhancement under section 22.011(f), the State was required to prove facts constituting a sexual assault and facts constituting one of the six bigamy prohibitions listed in section 25.01.

But here, the State put on evidence only of Senn's sexual assault of Brenda and his marriage license reflecting his marriage to Brenda's step-mother. There was no evidence that Senn took, attempted, or intended to take any action involving marrying or claiming to marry Brenda or living with Brenda under the appearance of being married. Evidence of the sexual assault and of Senn's marriage license to Brenda's step-mother, standing alone, do not amount to facts constituting one of the six bigamy prohibitions under section 25.01. Moreover, the State conceded in its original briefing[9] to this court "that it offered no evidence that [Senn] committed a bigamy offense with [Brenda]."[10] Thus, regardless of the correctness or incorrectness of the section 22.011(f) special issue submitted in this case,[11] because no facts exist that Senn

[9]We did not request, nor did the parties file, new briefing when this case was submitted after remand.

[10]Because the State did not have the benefit of *Arteaga*'s construction of section 22.011(f) when it tried this case, the State mistakenly believed that no proof of bigamy was required under section 22.011(f).

[11]As set forth above, *Arteaga* held that a jury charge involving a special issue on section 22.011(f) must include the definition of bigamy from section 25.01. 521

committed a bigamy offense with Brenda, the evidence is insufficient to "prove facts constituting bigamy" as required by *Arteaga*'s holding. *See id.* at 336 (stating that "[t]he legislature intended for the State to prove facts constituting bigamy whenever . . . the State invokes [s]ection 22.011(f)"). Based on the evidence presented, no reasonable factfinder could have found beyond a reasonable doubt that Senn and Brenda's relationship constituted bigamy when he sexually assaulted her. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *cf. Torres v. State*, No. 03-14-00712-CR, 2017 WL 3124238, at *5 (Tex. App.—Austin July 21, 2017, no pet.) (mem. op., not designated for publication) (holding, in light of *Arteaga*, evidence insufficient to prove that appellant "committed the first-degree-felony offense of sexual assault of a person whom he was prohibited from marrying under the bigamy statute"). Accordingly, we hold the evidence insufficient to trigger the statutory enhancement for sexual assault under section 22.011(f), and we sustain Senn's first issue.[12]

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S.W.3d at 338–39. Although the jury charge here did not comply with *Arteaga*'s holding, we need not address it further because Senn's jury charge issue would not afford him greater relief than his sufficiency challenge. *See Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000).

[12]Because we hold the evidence insufficient to trigger the statutory enhancement under section 22.011(f), we need not address Senn's fourth issue challenging the correctness of the jury charge or his second and third issues challenging the constitutionality of section 22.011(f). *See* Tex. R. App. P. 47.1 (requiring appellate court to address only issues necessary to disposition of appeal).

### F. Effect on Conviction and Punishment

Senn prays that we vacate the sentence on his sexual assault conviction and enter a judgment of acquittal. Because Senn does not challenge the sufficiency of the evidence to support the elements of sexual assault as a second-degree felony, it would be an "'unjust' windfall" for us to order an acquittal on the sexual assault charge based on insufficient evidence relating solely to the statutory enhancement that raised the offense to the level of a first-degree felony. *See Thornton v. State*, 425 S.W.3d 289, 298 (Tex. Crim. App. 2014). Moreover, in the course of convicting Senn of sexual assault as a first-degree felony, the jury must have found every element necessary to convict him of the charged sexual assault as a second-degree felony; therefore, there is sufficient evidence to support a second-degree felony conviction for sexual assault. *See id.* at 300. Thus, we modify Senn's sexual assault judgment to reflect that he was convicted of a second-degree felony, but we must remand that charge to the trial court for a new trial on punishment so that a factfinder may consider the proper punishment range. *See id.*; *Torres*, 2017 WL 3124238, at *6 (modifying judgment to reflect a conviction for the second-degree-felony offense of sexual assault, affirming the judgment as modified as to the finding of guilt, reversing the part of the judgment imposing sentence, and remanding to the district court for a new punishment hearing for that offense); *Smith v. State*, Nos. 02-08-00394-CR, 02-08-00395-CR, 2010 WL 3377797, at *15–16 (Tex. App.—Fort Worth Aug. 27, 2010, no pet.) (not designated for publication) (holding that when the first-degree felony range of punishment under

section 22.011(f) had been improperly applied to a defendant but the defendant had not challenged the sufficiency of the evidence to support second-degree felony convictions, the appropriate remedy was to "remand for a new trial on punishment alone").

## III. CONCLUSION

Having sustained Senn's first issue, which is dispositive of the appeal on remand, we affirm the trial court's judgment of conviction on Senn's unchallenged conviction for prohibited sexual conduct, modify the trial court's judgment on Senn's charge for sexual assault to reflect a second-degree felony, reverse the trial court's judgment on Senn's charge for sexual assault as to punishment, and remand the sexual assault case to the trial court for a new trial on punishment only.

/s/ Sue Walker
Sue Walker
Justice

Publish

Delivered: October 25, 2018

# APPENDIX B


# In the
# Court of Appeals
# Second Appellate District of Texas
# at Fort Worth

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No. 02-15-00201-CR

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MICHAEL RAY SENN, Appellant

V.

THE STATE OF TEXAS

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On Appeal from the 213th District Court
Tarrant County, Texas
Trial Court No. 1308222R

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Dissenting Opinion on Remand and on Rehearing by Justice Gabriel

## DISSENTING OPINION ON REMAND AND ON REHEARING

The majority holds that because the State failed to prove that appellant Michael Ray Senn actually committed bigamy at the time he sexually assaulted his biological daughter, the evidence was insufficient to prove the alleged first-degree enhancement, entitling Senn to a new trial on punishment. Because I believe the court of criminal appeals has twice stated that the State need only introduce evidence showing that the defendant would have been guilty of bigamy if he were to marry or claim to marry his victim, I would initially conclude that the State met its burden of proof regarding the enhancement allegation and would request a response to the State's motion for rehearing.

The majority points out an inconsistency in one of the cases controlling this court's analysis: *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017). In one portion of its opinion, the court of criminal appeals declares that in a prosecution for sexual assault including the enhancement allegation, the State "is required to prove facts constituting bigamy." *Id.* at 335. The court then immediately followed this statement with a clarifying, and now pivotal, footnote:

> When we discuss "facts that *would* constitute bigamy," we do not mean that the State has to prove that the defendant committed the offenses of sexual assault and bigamy. What we mean is that, to elevate second-degree felony sexual assault to first-degree felony sexual assault . . . , the State must prove that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he *would* be guilty of bigamy.

*Id.* at 335 n.9.

I agree with the majority that these two holdings conflict and give this court inconsistent guidance on the State's burden of proof on the sexual-assault enhancement. And if the court of criminal appeals had stopped there, I possibly would have deferred to the majority's choice of the appropriate holding to follow. But I disagree with the majority to the extent its choice is based on the location of the "would have constituted" holding in the court of criminal appeals' opinion. The court of criminal appeals has held that it is not constrained to follow its own footnotes, but it has recognized that it is bound by footnotes authored by the United States Supreme Court. *See Gonzales v. State*, 435 S.W.3d 801, 813 n.11 (Tex. Crim. App. 2014) (stating *in a footnote* that although it is not "bound" by its footnote holdings, it is bound by Supreme Court holdings contained in footnotes). As the court of criminal appeals is bound by the court tasked with the discretionary review of its opinions, we also should be bound by the court of criminal appeals' similar directives to us. Further, the court of criminal appeals frequently relies on its own footnotes, weakening its prior pronouncements that footnotes have minimal precedential value. *See, e.g.*, *Estes v. State*, 546 S.W.3d 691, 699 & n.50 (Tex. Crim. App. 2018) (quoting *Arteaga*, 521 S.W.3d at 335 n.9 for that opinion's holding); *McClintock v. State*, 444 S.W.3d 15, 20 & n.20 (Tex. Crim. App. 2014) (citing *State v. Gobert*, 275 S.W.3d 888, 891–92 n.12 (Tex. Crim. App. 2009) as support for what the court previously "held"); *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999) (citing *Boykin v. State*, 818 S.W.2d

782, 785–86 & 786 n.4 (Tex. Crim. App. 1991) to support legal holding). *See generally Gonzales*, 435 S.W.3d at 813 n.11 ("Finally, it is not clear how much precedential value a pronouncement delivered by this Court in a footnote should carry, considering that we have stated [in a footnote] that footnotes 'should receive minimal precedential value.'" (quoting *Young v. State*, 826 S.W.2d 141, 144 n.5 (Tex. Crim. App. 1991)). Disregarding the placement of a court of criminal appeals' holding—in the text or in a footnote—seems appropriate especially because the court of criminal appeals recently and routinely began placing all of its supporting citations in footnotes. *See, e.g.*, *Beham v. State*, No. PD-0638-17, 2018 WL 4344389, at *1–7 (Tex. Crim. App. Sept. 12, 2018); *White v. State*, 549 S.W.3d 146, 147–58 (Tex. Crim. App. 2018).

In any event, the court of criminal appeals did not stop at its "facts constituting bigamy" holding in the text. In *Arteaga*, Judge Kevin Yeary filed a concurring opinion that addressed the inconsistency between the text and footnote 9 and posited that the correct holding was that "the State need not 'prove facts constituting bigamy' in the sense that it must prove the actor *actually* committed bigamy." 521 S.W.3d at 341 (Yeary, J., concurring). Indeed, he concluded that because footnote 9 clarified the court's holding that the facts need only show bigamy would have been committed if the perpetrator were to marry the victim, he was "satisfie[d] . . . that the Court's understanding [was] the same as [his] own." *Id.* at 344. The *Arteaga* majority did not respond to Judge Yeary's stated understanding of its holding.

Almost a year after *Arteaga*, the court of criminal appeals again addressed the sexual-assault enhancement in *Estes*. 546 S.W.3d at 699–702. The *Estes* court relied on *Arteaga* and began its analysis of section 22.011(f)—the sexual-assault enhancement—by summarizing the *Arteaga* holding to be that as stated in footnote 9: "We have interpreted Section 22.011(f) as essentially requiring proof 'that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy.'" *Id.* at 699 & n.50 (quoting *Arteaga*, 521 S.W.3d at 335 n.9). Therefore, the court of criminal appeals recognized that its holding in *Arteaga* required the State to establish that the alleged offense would constitute bigamy if the victim and the perpetrator were married or held themselves out to be married, not that bigamy was actually committed.

Accordingly, I would hold that the State was required to proffer sufficient evidence that *if* Senn had married or held himself out to be married to his daughter, he *would have* committed bigamy.[1] Because the State did so by proffering undisputed evidence that Senn was married to someone else at the time he sexually assaulted his daughter, I would preliminarily conclude that the sexual-assault enhancement was

[1]The fact that Senn was barred from marrying his daughter by consanguinity does not affect an analysis of the statutory sexual-assault enhancement, which refers solely to bigamy. *See Arteaga*, 521 S.W.3d at 338; *see also Cope v. State*, No. 05-17-00515-CR, 2018 WL 2926752, at *3 (Tex. App.—Dallas June 7, 2018, no pet.) (mem. op., not designated for publication).

supported by the evidence and would request a response to the State's motion for rehearing.[2] *See* Tex. R. App. P. 49.2. Because the majority does not, I respectfully dissent.

/s/ Lee Gabriel
Lee Gabriel
Justice

Publish

Delivered: October 25, 2018

[2]The court of criminal appeals, by vacating our prior judgment, also remanded Senn's fourth issue in which Senn argued that the jury charge erroneously lacked a bigamy definition. *State v. Senn*, No. PD-0145-17, 2017 WL 5622955, at *1 (Tex. Crim. App. Nov. 22, 2017) (not designated for publication). Because the majority does not address Senn's fourth issue after sustaining his first issue, I express no opinion on the merits of issue four. In his petition for discretionary review, Senn did not challenge this court's prior determination of his second and third issues.