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⚖ Vol. 25, No. 5, February 13, 2017

Case Name: [Rodney Dimitrius Lake v. The State of Texas](#)

- OFFENSE: Sexual Assault
 - COUNTY: Tarrant
 - Court of Appeals: Fort Worth
 - C/A CITATION: 481 S.W.3d 656
 - C/A RESULT: Conviction Reversed
 - CCA. CASE No. PD-0196-16
 - DISPOSITION: Court of Appeals Reversed
 - OPINION: [Keller, PJ.](#) VOTE: 4-4-1
 - TRIAL COURT: Cr D/C 1; Hon. Elizabeth Beach
 - LAWYERS: [Paul Francis](#) (Defense); [Helena Faulkner](#) (State); [Lisa McMinn](#) (SPA)
- DATE OF OPINION: February 8, 2017

⚖ 205 Trial Courts / Trial Judge's Actions: Appellant was serving a term of community supervision which the State sought to revoke, alleging that Appellant had violated five conditions of his community supervision. After evidence closed on the State's motion, defense counsel asked to make a closing statement, "when the time comes." The trial court responded, stating, "I don't need one." On appeal, Appellant argued that the trial court violated his rights to due process and effective assistance of counsel by denying his request to present closing argument. The State argued that Appellant had failed to preserve error. The Court of Appeals addressed and rejected the State's contention with respect to preservation. Then, citing [Herring v. New York](#), 422 U.S. 853 (1975), and [Hyer \[v. State\]](#), 335 S.W.3d 859 (Tex.App. - Amarillo 2011)(see ⚖, [Vol. 19, No. 11](#); 03/21/2011), the Court of Appeals concluded that the trial court had violated Appellant's Sixth Amendment right to the effective assistance of counsel and his state constitutional right to be heard. In a section entitled "Reversible Error Presumed from Denial of Closing Argument," the Court of Appeals concluded, without elaboration, that, "because the error is constitutional and the effect of the denial of closing argument cannot be assessed, the error is reversible without any showing of harm." The Court of Appeals reversed the trial court's revocation judgment and remanded the case for a new trial on revocation (see ⚖, [Vol. 23, No. 8](#); 02/23/2015). On PDR, the State complains that the Court of Appeals erred in treating the refusal to allow closing argument as "structural error immune from a harmless error analysis" and that the Court of Appeals's decision "is contrary to decisions of the United State's Supreme Court and this Court defining what constitutes structural error."

Holding: In Cain v. State, 947 S.W.2d 262 (Tex.Cr.App. 1997)(see 68, Vol. 5, No. 24; 06/23/1997), we issued a broad mandate that nearly all errors would be subject to a harm analysis, with only limited exceptions as follows: “Except for certain federal constitutional errors labeled by the United States Supreme Court as ‘structural,’ no error . . . is categorically immune to a harmless error analysis.” As the standard suggests, only federal constitutional errors can be “structural,” though most federal constitutional errors are not structural. *** We conclude that the Supreme Court has not labeled Herring error as structural -- even at the guilt stage of trial, much less on revocation. This holding is consistent with our policy to generally require a harm analysis -- precluding one only where the Supreme Court has expressly eschewed it -- and it is the cautious approach, because the constitutional harm standard is an onerous one for the State, and the nature of the error can be considered in determining whether harmlessness is in fact shown beyond a reasonable doubt. We reverse the judgment of the Court of Appeals and remand the case to that court to conduct a harm analysis.

Concurring / Dissenting Opinions: Judge Yearly delivered a concurring opinion. He was joined by Judge Newell and Judge Keel and criticized the plurality opinion, “because it persists in adhering to certain categorical language in Cain, that I believe may not have survived the enactment of Rule 44.2(a).” He noted that, in construing former Rule 81(b)(2), Tex.R.App.Pro., the Court declared in Cain that “all error is subject to a harm analysis, with only a single exception: “certain federal constitutional errors labeled by the United States Supreme Court as ‘structural[.]’” He argued that, it is “not at all clear to me that Rule 44.2(a) should be read to deprive us of this authority in the same way that we read Rule 81(b)(2) to constrain us in Cain.” Judge Alcalá filed a dissenting opinion, noting that, “there appears to be unanimous agreement that the trial court violated” the defendant’s constitutional “by refusing to permit his attorney to make a closing argument” at the trial court’s hearing on the motion to revoke community supervision. She argued that the Court of Appeals was correct, and that the defendant is entitled to a new revocation hearing. Judge Walker concurred without note.

(David A. Schulman) The problem now is that, in order succeed, Appellant has to accomplish the impossible, prove that the argument defense counsel would have made is likely to have resulted in a lesser sentence. I know this is possible in cases involving judge sentencing, as I have had a judge tell me that they were happy I emphasized certain points in my argument at sentencing and that they had imposed a lesser sentence than they were going to impose. Is that something I could have proven if the judge had not heard my argument? Probably not. Thus, I believe that harm should be presumed in these situations.

(John G. Jasuta) Absolutely predictable.