RECENT CASES YOU CAN ACTUALLY USE

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I. Scope of Paper

This paper discusses selected criminal cases, most of which were decided by the Texas Court of Criminal Appeals, the San Antonio Court of Appeals, or the United States Supreme Court, between September 1, 2007, and March 5, 2008.

II. Topics

APPEAL

1. Construing the waiver rules too broadly might erode public confidence in our criminal justice system.

***Alcocer v. State*, 2008 WL 506263 (Tex. App.–San Antonio 2008, no pet. h.)**

The majority overruled appellant's complaint about the court's instruction to the jury, holding that any error was waived. Justice Hilbig concurred, believing that no error had been committed, but also lodging this protest on the question of preservation:

> "This court should address the merits of Alcocer's point of error. *Public confidence in our criminal justice system is eroded when we fail to address the merits of a complaint because we too broadly construe the rules applicable to waiver*. By finding waiver, the majority seemingly engrafts a new requirement onto Rule 33.1 of the Texas Rules of Appellate Procedure. Based on its conclusion, the majority appears to require a party not only to object to a court's action and state the ground for the objection, but also to make all supporting arguments to the trial court or else waive such argument on appeal. The presentment of all arguments versus presentment of grounds for the objection has never been required to avoid waiver on appeal." [emphasis supplied]

2. What is the objection when the prosecutor calls your client a son-of-a-bitch?

***Gallo v. State*, 239 S.W.3d 757 (Tex. Crim. App. 2007)**

Appellant complained that the trial court erroneously denied his motion for mistrial when the prosecutor twice used curse words in his final argument. This is how the record reads:

[PROSECUTOR]: It doesn't take a rocket scientist at that point

to figure out who your suspect is, and it kind of helps when you've got an idea who you are looking for and *the son-of-a-bitch* is running-

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Sustained.

[DEFENSE COUNSEL]: We ask for an instruction to disregard.

THE COURT: The jury will be instructed to disregard the last comment.

[DEFENSE COUNSEL]: And we respectfully ask for a mistrial.

THE COURT: Overruled.

* * *

[PROSECUTOR]: He's thinking, *oh, shit*, what have I done? What am I going to do now?

[DEFENSE COUNSEL]: I object again-

THE COURT: Sustained.

[DEFENSE COUNSEL]: I ask the jury be instructed to disregard.

THE COURT: [Prosecutor], please refrain-please use proper language.

[PROSECUTOR]: Yes, ma‘am.

[DEFENSE COUNSEL]: We ask that a mistrial be granted.

THE COURT: Overruled.

The court of criminal appeals rejected appellant's claim that this argument "subjected [him] to epitaphs unworthy of courtroom decorum and in violation of the United States Constitution."

> His general objection at trial does not comport with his argument on appeal. Further, he fails to explain on appeal exactly which of his federal constitutional rights were violated. This portion of his argument is not preserved and is inadequately briefed.

3. Does the objection "improper bolstering" preserve error?

***Rivas v. State*, 2007 WL 1608550 (Tex. App.–San Antonio 2007, pet. granted)(not designated for publication)**

Appellant objected that the sexual assault nurse examiner's records improperly bolstered the child complainant. The court of appeals held that the bolstering objection fails to preserve error because it does not invoke the Rules of Evidence or otherwise inform the trial court of the basis of the objection.

The court of criminal appeals granted appellant's petition for discretionary review to determine the following: "The court of appeals erred in finding that appellant failed to preserve error with an objection to "improper bolstering."

4. An objection is not required to preserve a complaint about admonishments.

***Bessey v. State*, 239 S.W. 3d 809 (Tex. Crim. App. 2007)**

Appellant pleaded guilty to various sex offenses, and the jury sentenced him to multiple life sentences, which the trial court stacked. On appeal, appellant complained that the trial court did not properly admonish him as to his duty to register as a sex offender. The state argued that appellant waived error because he did not make this objection at trial. The state also argued that the error was harmless.

The Court of Criminal Appeals held that this sort of error does not require an objection at trial to preserve it because it is a "waivable-only right" that was not waived.

> This is because the court has a statutory duty to properly admonish defendants as described by Article 26.13. "A law that puts a duty on the trial court to act *sua sponte*, creates a right that is waivable only. It cannot be a law that is forfeited by a party's inaction."

The error, here, though was harmless, considering the strength of the evidence against appellant, and the fact that, since appellant will not be eligible for parole until he has served 100 years of his sentence, he will not be subject to the requirement that he register as a sex offender.

5. The Court of Appeals has jurisdiction to consider a defendant's incompetency at the hearing to adjudicate guilt.

***Durgan v. State*, 240 S.W. 3d 875 (Tex. Crim. App. 2007)**

After being placed on deferred adjudication, appellant's guilt was adjudicated and she was sentenced to prison. She appealed, asserting that she had been incompetent at the adjudication hearing. The Court of Appeals dismissed the appeal, holding that appellant had no right to appeal from the trial court's decision to adjudicate guilt under article 42.12, § 5(b).

The Court of Criminal Appeals disagreed and reversed. Section 5(b) does not bar appeals that do not challenge the decision to adjudicate guilt.

> An assertion that a defendant was not competent at the time of the adjudication hearing is such a complaint; it raises a preliminary due-process issue that must be resolved before the adjudication process may begin. The adjudication process begins when the state files a motion to adjudicate, a motion that is based on an alleged violation of the terms or conditions of the deferred adjudication. The status of being incompetent is not a violation of a term or condition of community supervision and cannot, therefore, be the basis for a motion to adjudicate. If incompetence cannot be the basis for a motion to adjudicate, it cannot be the basis for a decision to adjudicate. It is thus separate and distinct from the decision to adjudicate. Because it is a separate and distinct inquiry, the court of appeals has jurisdiction to resolve the issue.

ASSISTANCE OF COUNSEL

1. The *Strickland* benchmark: Did the trial produce a "just result?"

***Ex parte Aguilar*, 2007 WL 3208751 (Tex. Crim. App. 2007)(not designated for publication)**

Aguilar was convicted of murder and, after her conviction was affirmed on appeal, she filed a writ claiming her trial counsel had been ineffective. The trial court recommended relief be denied because Aguilar had not proven prejudice under *Strickland*.

Aguilar argued in the Court of Criminal Appeals that the trial court had erred when it considered each allegation of counsel's deficient performance separately.

" We filed and set this case to clarify the manner in which we assess counsel's errors in determining prejudice under *Strickland v. Washington*, 466. U.S. 668 (1984). We hold, as we have indicated in the past, that such errors should be considered cumulatively."

The Court identified a number of examples of deficient performance, mostly relating to the admission of extraneous misconduct against Aguilar, and concluded that, "while each of the alleged errors standing alone might be insufficient to prove ineffective assistance of counsel, taken together, under the cumulative-error standard, they significantly prejudiced applicant's defense."

Strickland v. Washington does not provide a "mechanistic formula." "Rather, '[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'"

2. When a reasonable strategy is to prove your client is a robber and murderer.

***Ex parte Ellis,* 233 S.W. 324 (Tex. Crim. App. 2007)**

Ellis was charged with possessing cocaine, and his own lawyer introduced the arresting officer's police report. The prosecutor, after noting that such reports are not admissible, said, "but we'll let it in. We have no objection." The defense focused on the part of the report that said that the co-defendant, who testified for the state and against the appellant, was on probation for possession of marijuana. On redirect, the state had the officer read the rest of the report, that said appellant was on parole for robbery, and that he was charged with murder.

After he was convicted and sentenced to 15 years Ellis filed a writ alleging trial counsel was ineffective for letting the jury hear about the otherwise inadmissible extraneous robbery and murder charges.

Not so said the Texas Court of Criminal Appeals, *unanimously*.

At the writ hearing, trial counsel testified that, although he lacked "perfect recollection," he had some memory of the circumstances surrounding the police report. He had used it to impeach the codefendant about his prior involvement with drugs. And he wanted the part about appellant's conviction for robbery, to show that he had been an "exemplary person," inasmuch as he had successfully completed his parole. Counsel also liked that he had been honest with the policeman about his criminal history. The murder was a little more problematic: counsel admitted that his client would be a "gone goose" if the jury read that he had a murder charge in his criminal record. Whatever.

The court of criminal appeals saw no problem. " We conclude that trial counsel's strategic reasons for offering Deputy Donahoe's police report were not unreasonable according to prevailing professional norms as required under the first prong of the *Strickland* framework. Although the defensive course chosen by counsel was risky, and perhaps highly undesirable to most criminal defense attorneys, we cannot say that no reasonable trial attorney would pursue such a strategy under the facts of this case." *Id*. at 331.

In so concluding, the court recognized the problems with proving your client is a robber now charged with murder. But, because these were violent crimes, they "diminished the likelihood of his involvement" in the charged drug offense. Moreover, these violent offenses enhanced appellant's credibility, because they allowed counsel to showcase his client's candor with the police officer when he was arrested.

"We conclude that counsel's decision to offer Deputy Donahoe's report was based on a sound trial strategy. Counsel's strategy, as executed, was designed to persuade the jury that all of the cocaine belonged to Davis. And although the means adopted by counsel were risky, we cannot ignore the fact that counsel's tactics could have achieved the desired result -an acquittal for Ellis. Therefore, we agree with the trial judge and hold that Ellis has not shown that counsel's performance was deficient as contemplated by the first *Strickland* prong." *Id*. at 336.

3. What happens if you have a trial and the defense lawyer refuses to play?

***Cannon v. State*, 2008 WL 141902 (Tex. Crim. App. 2008)**

On the day of trial the defense lawyer moved for a continuance and to recuse the trial judge, and both motions were denied. Thereafter he continued to tell the judge that he was unprepared to go to trial, he refused to participate in jury selection, and he declined to cross-examine witnesses, make objections, put on a defense, object to the jury charge, make an argument, or to offer any punishment evidence or argument. He did make a

motion for directed verdict, which was overruled, and he corrected the trial court after it misstated appellant's sentence.

The court of criminal appeals held that the appellant was denied the effective assistance of counsel, and reversed the conviction.

"We hold that defense counsel's behavior, considered as a whole, constructively denied appellant his Sixth Amendment right to the effective assistance of counsel. Defense counsel, although physically present in the courtroom at all the requisite times, effectively boycotted the trial proceedings and entirely failed to subject the prosecution's case to meaningful adversarial testing. By his refusal to participate, defense counsel abandoned his role as advocate for the defense and caused the trial to lose its character as a confrontation between adversaries. Prejudice to the defense is legally presumed."

The court of criminal appeals saw no danger that other lawyers would be encouraged to boycott trials, because lawyers who do so will face disciplinary action and civil lawsuits for malpractice. "Furthermore, a trial court can meet the threat of attorney non-participation by ascertaining whether the defendant understands the implications and probable consequences of his counsel's conduct and whether the defendant is knowingly, intelligently, and voluntarily waiving his right to the effective assistance of counsel."

After reversing the conviction, the court of criminal appeals directed "the Clerk of this Court to send a copy of this opinion to the Office of the Chief Disciplinary Counsel of the State Bar of Texas, so that officials therein may begin such investigation and take such action as they may deem appropriate."

4. Defendant's lawyer should not also have represented complainant's mother.

***Acosta v. State*, 2008 WL 138076 (Tex. App.–San Antonio 2008, no pet. h.)(not designated for publication)**

Appellant was charged with the aggravated sexual assault of his daughter. Before trial the child's mother asked appellant's lawyer to help her prevent CPS from taking the child from her custody. During trial the court excluded statements made by the child to the CPS investigator. Trial counsel, though, decided that the best way to help the *mother* was to establish inconsistencies between what the child had said in her audiotaped interview and the written summary prepared by the investigator. During final argument, counsel recognized that he had erred. Later, at the motion for new trial, counsel testified that his tactic was meant to help the mother, and that it did appellant no good whatsoever.

The conviction was reversed pursuant to *Cuyler v. Sullivan*, 446 U.S. 335 (1980). There was an actual conflict of interest that actually colored counsel's actions during trial.

5. Denial of counsel cannot be harmless error.

***Williams v. State*, 2008 WL 141910 (Tex. Crim. App. 2008)**

The trial court allowed defendant to represent herself at her trial for misdemeanor terroristic threat. The court told defendant the charge, the range of punishment, and that she would be dealing with an experienced prosecutor. The court also told defendant she was entitled to be represented by counsel, but did not inquire whether she was indigent, and did not tell her she was entitled to court appointed counsel if she was indigent.

The court of appeals held that appellant's waiver was not made knowingly, intelligently, and voluntarily because the trial court did not properly inquire into her indigent status and admonish her about her right to appointed counsel. The state did not quarrel with this holding, but complained that the court of appeals erred by not conducting a harm analysis.

The court of criminal appeals disagreed with the state and affirmed the reversal. The invalid waiver waived nothing. Defendant was entitled to be represented by counsel and was denied her right to counsel when the trial court allowed her to represent herself. "We conclude that Williams's trial was rendered fundamentally unfair and unreliable because she was denied the right to appointed counsel. The application of a harmless error analysis is therefore not appropriate; prejudice is presumed."

6. Are you competent to represent yourself, just because you are competent to stand trial?

***Indiana v. Edwards*, No. 07-208**

On December 7, 2007, the United States Supreme Court granted certiorari to decide this question: "May States adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?"

7. The 30-day period for filing a motion for new trial is a critical stage during which defendant is entitled to the effective assistance of counsel.

***Cooks v. State*, 240 S.W. 3d 906 (Tex. Crim. App. 2007)**

The 30-day period of time that a defendant has to file a motion for new trial following his sentencing is a "critical stage" during which he is entitled to the effective assistance of counsel. The deprivation of the effective assistance of counsel during this stage, however, is subject to a harm analysis.

CONFESSIONS

1. "He told me he didn't want to talk to me . . . he didn't want to talk about it anymore," was not an ambiguous invocation of the right to remain silent.

***Ramos v. State*, 2008 WL 313900 (Tex. Crim. App. 2008)**

Appellant was placed in custody for murder and questioned by San Antonio police detective Angell. According to Angell, after more than 45 minutes of questioning: "He told me that he didn't want to talk to me. That he didn't want to talk about it anymore." Angell then left the room, but soon returned with another detective, and the questioning resumed and ultimately appellant admitted to firing the weapon. To Angell, Ramos's quoted response did not express a desire to terminate the interview: "He hadn't terminated the interrogation. He told me that he didn't want to talk about it anymore."

The trial court admitted Ramos's confession, and the San Antonio court of appeals affirmed. "A reasonable officer in Angell's position could have interpreted Ramos's statements in numerous ways and not solely as an unmistakable and unequivocal insistence on terminating the interview. Because Ramos failed to articulate a desire to cut off questioning with sufficient clarity to invoke his constitutional right to remain silent, we hold the trial court did not abuse its discretion in denying the motion to suppress." *Ramos v. State*, No. 04-04-00784-CR, slip op. at 4. The majority opinion was written by Justice Duncan, joined by Justice Angelini. Justice Marion concurred, believing that Ramos unambiguously invoked his right to remain silent, but also that the error in admitting the statement was harmless. *Ramos v. State*, No. 04-04-00784-CR (Marion, J., concurring).

The court of criminal appeals reversed. If a person in custody indicates in any manner that he wishes to remain silent, the interrogation must cease. No particular phraseology is required to invoke the right to remain silent. Termination, though, is not required if the invocation of rights is ambiguous.

> Appellant's statement to Angell that he did not want to talk to him was an unambiguous, unequivocal, and unqualified assertion of his right to remain silent. *Ibid*. A reasonable police officer in Angell's position would not have found appellant's assertion of his right to be ambiguous. Any ambiguity in

appellant's other statement to Angell, that he did not want to talk about "it" anymore, was, in context, entirely irrelevant. Thus, the record does not reasonably support the trial court's ruling that appellant did not unambiguously assert his right to remain silent, and the court of appeals erred in holding otherwise.

2. **Is a defendant's telephone conversation recorded during a videotaped interrogation session an inadmissible "oral communication?"**

Moseley v. State**,** 223 S.W.3d 593 (Tex. App.–Amarillo 2007, pet. granted)

Appellant was transported to the police department and interviewed about a murder. During the course of the interview he made two telephone calls to persons outside the jail. Moseley's side of the conversation was recorded and was played for the jury. He contended on appeal that this recording was inadmissible because it was an illegally intercepted wire communication, in violation of § 16.02 of the Texas Penal Code.

The Amarillo court of appeals disagreed. According to the court, this was an "oral communication," not a "wire communication," so it need only determine whether appellant had a reasonable expectation of privacy. The court found he did not. There were signs in the area that informed appellant he was being videotaped. Although the detective could not say whether appellant read the signs or was advised of them, appellant admitted on the videotape that he was aware he was subject to being videotaped. "That fact alone defeats Appellant's contention that his statements were made with an expectation that they were not subject to interception. Furthermore, the circumstances here are comparable to a statement made by a defendant while in a jail cell, a scenario in which the Supreme Court has said that there is no expectation of privacy. [citation omitted] Therefore, without deciding whether the recording of Appellant's side of a telephone conversation constitutes an 'interception' of that communication for purposes of § 16.02 of the Penal Code, we conclude the communication itself was not made under circumstances that justify an expectation that the communication would not be intercepted and is, therefore, not an 'oral communication' within that statutory definition."

On June 27, 2007 the Texas court of criminal appeals granted discretionary review to decide the following issue presented by appellant: "The court of appeals erred in finding that the recording of appellant's telephone conversations made at the police station was not an intercepted wire communication, and therefore was admissible against appellant."

CONFRONTATION

1. An declaration to a policeman is testimonial if there is no ongoing emergency.

***Vinson v. State*, 2008 WL 141916 (Tex. Crim. App. 2008)**

The police responded to a 911 call and the complainant answered the door, bleeding and in pain from recently inflicted injuries. She identified her assailant as "Vinson," then recounted the details of the assault. The complainant did not testify, and the trial court allowed the policeman to testify over appellant's confrontation objections.

The issue in this case is whether, at the time the complainant made the statements, "circumstances were present that would objectively indicate the existence of an ongoing emergency."

The following is a list of non-exhaustive factors that determine the existence of an ongoing emergency:

"1) whether the situation was still in progress;"

"2) whether the questions sought to determine what is presently happening as opposed to what has happened in the past;"

"3) whether the primary purpose of the interrogation was to render aid rather than to memorialize a possible crime;"

"4) whether the questioning was conducted in a separate room, away from the alleged attacker; and"

"5) whether the events were deliberately recounted in a step-by-step fashion."

The fourth factor – whether appellant was present during the questioning – was crucial in this case.

As to the first declaration – that the complainant had been assaulted by "Vinson," the record is clear and unequivocal that appellant was present. The court of criminal appeals concluded that this statement was therefore non-testimonial, and therefore admissible under *Crawford*, since the trial court could rationally have determined that appellant was present and unsecured, and that the policeman was assessing an ongoing emergency.

Not so about the details of the assault, though. The record indicates that after the complainant identified the appellant he was secured and taken to the patrol car, and that that is where he was when the discussion of the details occurred. Because appellant was not present, and the other factors indicate there was no ongoing emergency present, this portion of the complainant's declaration violated appellant's right to confrontation, and was erroneously admitted under *Crawford*.

2. "Forfeiture by wrongdoing:" Does *Crawford* apply when the witness is unavailable because he was killed by the defendant?

***Giles v. California*, No. 07-6053**

On January 11, 2008, the United States Supreme Court granted certiorari to decide this question:

> In *Crawford v. Washington*, 541 U.S. 36, 62 (2004), this Court recognized that the forfeiture by wrongdoing rule "extinguishes confrontation claims on essentially equitable grounds." The question presented by this case is:
>
> > Does a criminal defendant "forfeit" his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?

3. Does *Crawford* bar the use of a child's videotaped evidence in a sexual assault case?

***Rangel v. State*, 2008 WL 375446 (Tex. Crim. App. 2008)**

The trial court admitted under article 38.071 an out-of-court forensic videotape made by CPS of a six year old in lieu of the child's live, in-court testimony at appellant's trial for aggravated sexual assault and indecency with a child.

The court of appeals held that the tape was "testimonial," for *Crawford* purposes, but that appellant's confrontation rights were not violated because he could have submitted written questions to the child to be answered in another out-of-court videotape session.

The state and the defense filed petitions for review, and the court of criminal appeals granted both petitions. Subsequently both petitions were dismissed as improvidently granted, although the court expressly observed that it "was in no way endorsing the court of appeals's opinion."

Judge Cochran dissented to the dismissal of both parties petitions saying that the court "should not shirk our duty in resolving appellant's constitutional question and in providing guidance to the Texas bench and bar." Judge Cochran then wrote:

> I would hold that the child-videotape statute, Article 38.071, cannot be construed to allow the admission of out-of-court testimonial hearsay statements unless the child testifies at trial or the defendant has had a prior opportunity to cross-examine that child. To the extent that the statute cannot accommodate the demands of the Confrontation Clause as explained in Crawford and Davis, it violates appellant's Sixth Amendment rights.

4. A latent fingerprint report and a gunshot residue analysis are "testimonial" under *Crawford*.

***Acevedo v. State*, 2008 WL 228004 (Tex. App.–San Antonio 2008, no pet. h.)**

A gunshot residue report by one who did not testify at trial was testimonial, but the defense objected only to hearsay, not to confrontation, so no *Crawford* issue was preserved. A latent fingerprint report prepared by a witness who did not testify at trial was testimonial and should not have been admitted over appellant's confrontation objection. The error was harmless, though.

5. Does *Crawford* apply to assertions made in the PSI report?

***Stringer v. State*, 241 S.W. 3d 52 (Tex. Crim. App. 2007)**

Appellant pleaded guilty to child pornography and requested a PSI. At sentencing he objected to a portion of the PSI that contained detailed assertions about a pending child pornography charge in another county. The trial court overruled the objection and sentenced appellant to nine years imprisonment.

The court of appeals held that appellant waived his right to confront at sentencing when he pleaded guilty. The court of criminal appeals disagreed and reversed, holding

that Stringer's written waiver of his right to confront and cross-examine made pursuant to article 1.15 applied to the guilt phase of the trial, but not to punishment. The case was remanded to the court of appeals to determine, among other things, whether the information contained in the 'Adult Felony History' section of the report is 'testimonial' under *Crawford*. If the court determines that the information is 'testimonial,' then the court shall consider whether Stringer was harmed."

6. *Crawford* may be retroactive under *state* law, even though not under federal law.

***Danforth v. Minnesota*, 2008 WL 441059 (2008)**

Danforth was convicted of a sex crime in Minnesota based, in part on a videotape of the six year old complainant. After Danforth's appeal was final, the Supreme Court decided *Crawford*. Danforth then filed a writ relief under *Crawford*. Minnesota ruled against Danforth, holding that he was not entitled to relief because *Crawford* was not retroactive under *Teague v. Lane*, and because the state could not fashion any broader retroactivity standard under its laws. The United States Supreme Court reversed.

"The question in this case is whether *Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We have never suggested that it does, and now hold that it does not." Although the states are not required to find *Crawford* retroactive to cases that were final when it was decided, neither *Teague* nor any other federal law prohibits them from doing so.

DEATH PENALTY

1. Can a state impose the death penalty for rape of a child in which no death results?

***Kennedy v. Louisiana*, No. 07-343**

In *Coker v. Georgia*, the Supreme Court held that a death sentence was unconstitutionally disproportionate for rape of an *adult* women in which no death resulted. 433 U.S.584, 598 (1977). *Coker* repeatedly references the crime of adult rape, thereby suggesting that rape of a child might be different. Since then several states have enacted statutes permitting the death penalty when a child is sexually assaulted, but not killed.

The United States Supreme Court has granted certiorari in *Kennedy* to decide these questions:

1. Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty.

2. If so, whether Louisiana's capital rape statute violates the Eighth Amendment insofar as it fails genuinely to narrow the class of such offenders eligible for the death penalty.

DEFENSES

1. Evidence is legally insufficient where no rational jury could have found against the defendant on his defense.

***Volosen v. State*, 2007 WL 3317941 (Tex. App.–Fort Worth 2007, pet. filed)(not designated for publication)**

Volosen was convicted of animal cruelty for killing his neighbor's dog while it was in his chicken pen. The court of appeals reversed, holding that the evidence was legally insufficient. The animal cruelty statute in effect at the time established a defense if the animal in question was in the act of killing or injuring animals of the defendant. The defendant need not prove that animals actually had been killed or injured. By entering an enclosed pen and chasing the chickens seconds before Volosen killed it, the dog was in the act of injuring the chickens, and no rational jury could have found against Volosen on this defense beyond a reasonable doubt.

DNA

1. Identity can be at issue even where the complainant knows the defendant.

***Blacklock v. State*, 235 S.W.3d 231 (Tex. Crim. App. 2007)**

The complainant testified that she knew appellant, and that he was the one who robbed and sexually assaulted her, and, on this basis, appellant was convicted and sentenced to imprisonment in 1995. Later he filed a motion for DNA testing under Chapter 64, alleging that new testing procedures available today would provide exculpatory results in his case. The trial court denied testing, believing that identity was not in issue because the complainant had testified that she knew appellant.

The Court of Criminal Appeals reversed.

> That the victim testified that she knew appellant and identified

> him as her attacker is irrelevant to whether appellant's motion for DNA testing makes his identity an issue and whether it shows that exculpatory DNA tests would prove his innocence. The language and legislative history of Article 64.03(a)(1)(B) make it very clear that a defendant, who requests DNA testing, can make identity an issue by showing that exculpatory DNA tests would prove his innocence. This applies even when a defendant has pled guilty, thereby conceding the issue of identity at trial.

DUE COURSE OF LAW

1. Is "Due Course of Law" more than "Due Process?"

***Pena v. State*, 226 S.W.3d 634 (Tex. App.-Waco 2007, pet. granted)**

Appellant moved for independent testing of the marijuana he was charged with possessing. Testing was impossible because the state destroyed the marijuana and lost all records concerning the testing, except the lab report. The trial court denied appellant's motion to suppress the lab report, and the court of appeals reversed.

The *federal* Due Process standard is found in *Arizona v. Youngblood*, 488 U.S. 51 (1988), which requires a defendant to show bad faith when the state fails to preserve "potentially useful" evidence. Appellant failed to meet that burden here.

Although the framers of the Texas Constitution intended that "due course of law" be construed the same as is "due process of law," it is also true that both are evolving and flexible concepts.

After *Youngblood*, it has been almost impossible to prove bad faith. Since that case though, much has changed. Twelve other states have decided that the *Youngblood* standard is not adequate to address the loss or destruction of potentially exculpatory evidence.

> [C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

> Therefore, we join those twelve states and hold that, under the Due Course of Law provision of Article I, Section 19, the State has a duty to preserve material evidence which has apparent exculpatory value, encompassing both exculpatory evidence and evidence that is potentially useful to the defense.

The court went on to adopt a three part balancing test to determine whether a defendant's state constitutional right to due course of law was violated by the state's failure to preserve potentially exculpatory evidence: would the evidence have been subject to discovery or disclosure; did the state have a duty to preserve the evidence; and, if there was a duty to preserve, was that duty breached, and, if so, what consequences should flow from the breach. The consequences depend on the degree of negligence, the importance of the evidence, and the sufficiency of the other evidence. Utilizing these tests, the court of appeals found appellant was denied due course of law.

There are three remedies for this error: dismissal; exclusion of the related evidence; an adverse inference instruction. Here, the court believed the best remedy was the instruction.

The Texas court of criminal appeals granted the state's petition for discretionary review to determine, among other things, whether the due course of law provision of the Texas Constitution grants a defendant broader protection than does Federal Due Process.

***See also Terrell v. State*, 228 S.W. 3d 343 (Tex. App.–Waco 2007, pet. granted)**

2. San Antonio disagrees with Waco.

The San Antonio court of appeals has declined to follow *Pena I*, and it may well feel the same about *Pena II*. *See* ***Gutierrez v. State*, 2006 WL 542594 *2 (Tex. App.–San Antonio 2006, no pet. h.)(not designated for publication); *Garcia v. State*, 2006 WL 47046 (Tex. App.–San Antonio 2006, no pet. h.)(not designated for publication); *Salazar v. State*, 2005 WL 3115847 (Tex. App.–San Antonio 2005, no pet. h.)(not designated for publication).**

DWI

1. Is a jury instruction on the breath test refusal an improper comment on the weight of the evidence?

***Bartlett v. State*, 2007 WL 2417367 (Tex. App.–Corpus Christi 2007, pet. granted)(not designated for publication)**

The trial court gave this instruction in a breath test refusal case:

> You are instructed that where a Defendant is accused of violating Chapter 49.04, Texas Penal Code, it is permissible for the prosecution to offer evidence that the defendant was offered and refused a breath test, providing that he has first been made aware of the nature of the test and its purpose. A Defendant under arrest for this offense shall be deemed to have given consent to a chemical test of his breath for the purpose of determining the alcoholic content of his blood.
>
> The prosecution asks you to infer that the defendant's refusal to take the test is a circumstance tending to prove a consciousness of guilt. The defense asks you to reject the inference urged by the prosecution and to conclude that because of the circumstances existing at the time of the defendant's refusal to take such test, you should not infer a consciousness of guilt.
>
> The fact that such test was refused is not sufficient standing alone, and by itself, to establish the guilt of the Defendant, but is a fact which, if proven, may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not the Defendant's refusal to take the test shows a consciousness of guilt, and the significance to be attached to his refusal, are matters for your determination.

The Corpus court of appeals disagreed that this was an improper comment on the weight of the evidence, and the court of criminal appeals granted appellant's petition for discretionary review to determine this: "Whether the trial court's instructions to the jury concerning its use of the breath test refusal as evidence constitutes a comment on the weight of the evidence?"

2. Only one useable blood specimen is permitted.

***State v. Neesley*, 239 S.W. 3d 780 (Tex. Crim. App. 2007)**

Appellant was involved in a fatal car crash and refused to consent to a blood draw, at which time the police took one from her mandatorily, as provided by § 724.012(b) of the Texas Transportation Code. An hour later they realized that the first draw was contaminated because, at the same time it was taken, appellant was also receiving a saline

drip in the same arm. So, a second blood draw was taken. The trial court granted the appellant's motion to suppress this second draw, and the state appealed.

The court of criminal appeals reversed the trial court's suppression order. "We hold that in cases which satisfy the conditions for mandatory taking of a specimen under § 724.012(b), a peace officer is required to take one specimen of breath or blood and is permitted to take no more than one specimen. In these cases, "specimen" is to be construed to mean a usable sample."

3. Must the state allege whether the defendant was intoxicated by loss of normal use or by the test results?

***State v. Barbernell*, 221 S.W. 3d 914 (Tex. App.–Beaumont 2007, pet. granted)**

The trial court quashed an information because it failed to allege whether defendant's intoxication was because of loss of use or test results over the legal limit. The Beaumont court of appeals affirmed the trial court pursuant to *State v. Carter*, 810 S.W.2d 197 (Tex. Crim. App.1991). The court of criminal appeals granted the state's petition for discretionary review which presented the following question: "Whether the manner of intoxication, either "loss of faculties" or "alcohol concentration," is an element of the offense of driving while intoxicated which must be alleged in the charging instrument? "

4. Gated communities less restrictive than air force bases are public places.

***State v. Gerstenkorn*, 239 S.W. 3d 357 (Tex. App.– San Antonio 2007, no pet.)**

The trial court granted the defendant's motion to suppress in this DWI case, holding that a street within a gated community was not a public place, and the state appealed.

The court of appeals reversed. A "public place" is "any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops. Tex. Pen.Code Ann. § 1.07(a)(40) (Vernon Supp.2006)." This definition is broad, open-ended, and gives the trial court wide discretion "to expand its parameters where appropriate." The court of appeals considered an Austin case in which the court of appeals there decided that Bergstrom Air Force Base was a public place. Gerstenkorn told a witness he was lost and did not know how to get out of the neighborhood, which the court took as evidence that anyone could gain access under the right circumstances, the gates notwithstanding. "Because no evidence was introduced to establish that access by the public to the gated community was more restrictive than access

to an air force base, we hold that the gated community described in our record was a public place as defined by the penal code.

5. DWI with a passenger under 15 coupled with a fatality can be felony murder.

***Bigon v. State*, 2008 WL 141929 (Tex. Crim. App. 2008)**

Appellant was driving an SUV while intoxicated with his 8 year old son as a passenger when he crossed over into another lane and killed two persons in the other car. He was indicted for two counts of intoxication manslaughter; two counts of manslaughter; and two counts of felony murder, the underlying felony being driving while intoxicated with a passenger younger than 15, and he was convicted of all six counts and sentenced to 18 years imprisonment.

The court of criminal appeals rejected appellant's argument that he not be convicted of felony murder because there was insufficient evidence to prove that the "act clearly dangerous to human life" was committed in furtherance of the felony DWI. The indictment alleged that the clearly dangerous act was driving a heavily loaded SUV towing a loaded trailer into an oncoming lane of traffic. "A fact-finder could rationally have found beyond a reasonable doubt that Appellant committed an act clearly dangerous to human life in furtherance of felony DWI."

6. Retrograde extrapolation permissible without knowledge of personal characteristics.

***Bigon v. State*, 2008 WL 141929 (Tex. Crim. App. 2008)**

The state's chemist used retrograde extrapolation to testify that appellant was over the legal limit at the time of the fatal accident. He assumed appellant was in the elimination phase at the time of the test based solely on a medical record in which appellant stated he last ate or drank an hour an a half before the accident. And he used a factor of 15-18% to convert serum blood results to whole blood results.

"In some cases, cross-examination could reveal the unreliability of an assumption similar to the one in this case or the unreliability of the retrograde extrapolation based upon such an assumption. However, based on the factors outlined in *Mata*, considering that Dr. Mott clearly explained retrograde extrapolation to the court, clearly explained how he calculated Appellant's blood alcohol level based upon his assumption, clearly explained how he converted the serum-blood result to a whole-blood result, consistently testified without contradicting himself, testified as to his years of experience with retrograde

extrapolation, as well as the underlying theory of the science and its methodologies, it was not an abuse of discretion to admit his scientific testimony."

7. Convictions for intoxication manslaughter, manslaughter, and felony murder violate double jeopardy.

***Bigon v. State*, 2008 WL 141929 (Tex. Crim. App. 2008)**

Appellant was driving an SUV while intoxicated with his 8 year old son as a passenger when he crossed over into another lane and killed two persons in the other car. He was indicted for two counts of intoxication manslaughter; two counts of manslaughter; and two counts of felony murder, the underlying felony being driving while intoxicated with a passenger younger than 15, and he was convicted of all six counts and sentenced to 18 years imprisonment.

The state conceded that the convictions for intoxication manslaughter and manslaughter violated double jeopardy, but claimed that the question whether appellant could properly have been convicted for intoxication manslaughter *or* manslaughter, *and* felony murder was a novel question, and that therefore the court of appeals should have not decided this unassigned error without permitting the parties a chance to brief it.

The court of criminal appeals disagreed. Appellate courts may addressed unassigned double jeopardy violations when the error is apparent from the face of the record, as it was here. "[U]nder the facts of this case, felony murder is the same as intoxication manslaughter, and intoxication manslaughter is the same as manslaughter. Because the multiple convictions for the same conduct violate double-jeopardy, only one of these convictions can be upheld."

The court also rejected the state's argument that, if there was a double jeopardy violation that necessitated some convictions be vacated and one retained, the prosecution should be able to determine which is retained. The court of criminal appeals disagreed. The appellate courts applies "the most serious offense test" to determine which offense is retained, and here, felony murder is the most serious because it is a first degree felony.

8. Concurrent-causation instruction was improper.

***Otto v. State*, 2008 WL 313942 (Tex. Crim. App. 2008)**

The indictment in this case alleged felony DWI, specifically, that appellant was intoxicated by reason of the introduction of alcohol into her body. Appellant testified that

she had only a small amount of alcohol, but that a friend of hers must have slipped her some unknown drug, and that it was this unknown drug, and not the alcohol, that caused her to be intoxicated.

The jury charge authorized appellant's conviction if the jury found her intoxicated by reason of the alcohol. Additionally, and over appellant's objection, the jury was given a "concurrent-causation charge" that authorized her conviction upon a finding that the alcohol intoxicated here, either alone, or in combination with an unknown drug.

The court of criminal appeals reversed the conviction.

> The issue presented in this case is whether a concurrent-causation jury instruction, that defines intoxication as the "introduction of alcohol, operating either alone or concurrently with an unknown drug," is substantively different from a jury instruction, that defines intoxication as the "introduction of a combination of alcohol and an unknown drug." We decide that there is no substantive or legally significant difference between these two charges and that the concurrent-causation jury charge in this case improperly expanded on the allegations in the indictment.

The court of criminal appeals has previously held that a synergistic effect, or susceptibility charge – which authorizes a conviction upon proof that the defendant consumed some drug that made her more susceptible to intoxication from alcohol – is permissible, because this is equivalent to intoxication by alcohol alone. It improperly expands the charging instrument, though, to authorize conviction on a theory that appellant was intoxicated either on the alcohol alone, or on the other drug alone, or on both, if the charging instrument alleges intoxication by alcohol alone.

The court held that the concurrent-causation charge given here was not like a susceptibility charge, but rather was an improper "combination" charge, considering the state's closing argument, and its position at the jury charge conference, and that it therefore erroneously authorized conviction on a theory not alleged in the indictment.

9. No reasonable suspicion to detain for public intoxication.

***Kelm v. State*, 2007 WL 3306578 (Tex. App.–Austin 2007, no pet. h.)(not designated for publication)**

Kelm had a wreck and went home. Her father went to the accident scene and spoke to the investigating officer, who ordered him to bring her back, she was brought back by her mother shortly thereafter. As the officer talked to her he observed her swaying and an odor of alcohol on her breath. He asked another officer to give her the field sobriety tests, and he took her a couple of blocks away and did so. She showed signs of intoxication, and was arrested.

The trial court erred in denying Kelm's motion to suppress. An investigative detention occurred when Kelm returned to the scene under police order. Here, it was not until after the seizure that the police had reasonable suspicion for the detention; therefore, the seizure was illegal.

The community caretaking exception applies only when that is the primary motivation of the officer and his belief that the person needs help is reasonable, which was not the case here.

Kelm's arrest for DWI was also illegal. First, the facts that led to her arrest were obtained as a result of the illegal detention. Second, there was no probable cause to arrest her for public intoxication, because she was with her mother, who could have safely taken her home.

EXPERTS

1. Expert's speculative testimony about possible effects of methamphetamine inadmissible.

***Acevedo v. State*, 2008 SWL 228004 (Tex. App.–San Antonio 2008, no pet. h.)**

Appellant was charged with murder; his defense was accident. The state called a witness who testified that appellant had told her, the day before the shooting, he thought he had ingested "too much" methamphetamine. The state also called Dr. Michael Arambula, a psychiatrist and pharmacist, who testified that, hypothetically, a person who had ingested "too much" methamphetamine at 8:00 or 9:00 pm the night before would "probably" still have the drug in his system the next day at 4:00 pm.

Arambula did not tie the science to the facts of the case. He did not know *any* of the particular facts of the case. "More specifically, Arambula possessed no information regarding: how much, or precisely what, Acevedo ingested and when; Acevedo's individual characteristics at the time of the incident; Acevedo's previous drug use, his tolerance for methamphetamine; or what Acevedo may have eaten during the previous

twenty-four hours."

> We conclude Dr. Arambula's testimony was merely speculative and, thus unreliable and irrelevant. An expert testifying to the effects of methamphetamine on a given individual must know more about the individual and quantity ingested than evidenced by Arambula's testimony. Accordingly, we conclude the trial court abused its discretion in admitting Arambula's testimony because it was unreliable and irrelevant to the case at bar.

EXPUNCTIONS

1. Beware of what you allege in your expunction petitions.

***State v. Vasilas* ,198 S.W.3d 480 (Tex. App.–Dallas 2006, pet. granted)**

The indictment for tampering with a government document alleged that lawyer Vasilas filed an expunction petition that contained three false entries, with intent to defraud and harm the state. Vasilas's motion to quash the indictment was granted because, among other things the penal statute was *in pari materia* with Rule 13 of the Rules of Civil Procedure.

The court of appeals reversed, finding that the penal statute and Rule 13 were not *in pari materia*.

The court of criminal appeals granted Vasilas's petition for discretionary review to decide this question: "Did the court of appeals err in concluding that the legislature intended to criminalize under Tex. Pen. C. § 37.10(a)(5) the use of pleadings and motions in civil cases containing allegations known to be false when such pleadings and motions are already governed by the more specific civil sanctions laws in Texas?"

EXTRANEOUS OFFENSES

1. Trial court erred in admitting 20 year old murder conviction.

***Pollard v. State*, 2008 WL 227973 (Tex. App.–San Antonio 2008, no pet. h.)**

The trial court erred in admitting evidence of appellant's 20 year old murder conviction in this retaliation case.

The state first asserts that appellant threatened the witness Kirk because he did not

want to go back to prison for sexual assault. "However, the State presented no testimony or other evidence to support this theory. The State's assertion that defendant's previous conviction, and resulting incarceration, motivated him to threaten Kirk with harm is mere speculation."

Nor was the prior conviction admissible to show the context for Kirk's belief that appellant was willing or capable of killing or harming him, because Kirk's state of mind was not relevant to the charge of retaliation.

To determine harm, the court focused on whether the error "might possibly have prejudiced the jury's decision-making." Here the state emphasized the old murder case throughout the trial, including in its opening statement, when examining the complainant, and in its summation. The evidence of guilt was far from overwhelming. "For these reasons, we conclude the State's emphasis of the murder conviction prejudiced the jury's decision-making, causing a substantial and injurious effect or influence on the jury's verdict, thereby affecting defendant's substantial rights."

2. Trial court erred in admitting extraneous misconduct absent notice, but error was harmless.

***Camacho v. State*, 2007 WL 3270766 (Tex. App.–San Antonio 2007, no pet.)(not designated for publication)**

Camacho timely requested notice of any extraneous misconduct that the state would seek to introduce at the guilt and punishment phases of the trial. The state responded that it intended to prove, among other things, that Camacho had committed extraneous acts of sexual assault against his five-year-old son, by causing another child to engage in sexual conduct with the five-year old "on numerous occasions prior to the date of the indictment." When the state called the five-year old at punishment, the defense objected to his testimony because the state's notice was insufficient because it had not even included a general or approximate date on which the acts occurred.

First, the state had the audacity to argue that appellant waived error because he did not make his objection to the inadequate notice before trial. According to the state, a "pretrial objection was required to avoid 'gamesmanship' and 'trial by ambush.'" The Court of Appeals disagreed: "Camacho was only required to object before the jury heard the objectionable evidence, and he did so."

Second, the state said the "notice" it gave substantially complied with the statute. The court of appeals disagreed. "[T]he State's notice only narrowed the relevant time

frame for the extraneous acts to a range of five years prior to the indictment. Even given the relaxed notice standards applicable to child witnesses, we conclude a five-year range is too general to satisfy the date requirements of article 37.07 § 3(g)."

Although the court of appeals found the trial court erred in admitting the punishment evidence, the error was harmless, considering that appellant never contended he was surprised, nor did he show how his defensive strategy might have been different had he had notice.

3. Trial court erred when it admitted extraneous theft of gun.

***Fischer v. State*, 235 S.W. 3d 470 (Tex. App.–San Antonio 2007, pet. granted)**

Appellant was charged with murdering Ms. Camp, his aunt, who was killed by a gun with a distinctive firing pattern consistent with a .22 caliber Cricket Keystone rifle. Two weeks after the murder this type of rifle was discovered stolen from a Wal-Mart where appellant was employed as a support manager, and one of 14 people who had keys to the gun locker.

The court of appeals held that the trial court erred in admitting evidence of the theft f the gun from Wal-Mart because there was insufficient evidence to link this theft to appellant. "[T]he oly link between Fischer and the theft is that he was one of possibly fourteen managers with a key to the gun locker and that he 'mentioned' that Wal-Mart was selling a small child's rifle. Although the proffer may well have identified Fischer as one several possible suspects in the theft of the gun, the proffer falls short of providing egally sufficient evidence to allow the trier of fact to reasonably find that Fischer ommitted the offense."

The Court of Criminal Appeals has granted the state's petition for discretionary eview to decide the following questions:
1. id the court of appeals err in holding that the trial court reversibly erred in admitting exraneous offense evidence because the state's rule 104(b) proffer was not sufficient to prve beyond a reasonable doubt that the appellant committed the extraneous offense, even though the evidence adduced during the trial was sufficient to prove that the ppellant comitted the extraneous offense?
. Did the court of appeals err in applying a no evidence standard of review test inetermining the admissibility of evidence in direct contravention of this court's prior oldings?

. Did the court of appeals err in confining its review of the trial court's ecision to admit evidence of an extraneous offense solely to the rule 104(b)

roffer or should the court have considered all of the evidence admitted at rial concerning the extraneous offense?

4. Did the court of appeals err in resurrecting, sub silentio, the reasonable alternative hypothesis construct by requiring the state to exclude all other possible perpetrators of the extraneous offense other than the appellant in its rule 104(b) proffer?

5. Must a party's rule 104(b) proffer seeking admission of a rule 404(b) extraneous offense satisfy the "beyond a reasonable doubt" quantum of proof necessary for a criminal conviction, even when the criminal aspect of the defendant's 404(b) conduct is not relevant to his guilt or innocence in the case being tried?

6. Did the court of appeals apply an improper standard in conducting its harm analysis by ignoring the fact that the jury was given a limiting instruction on the extraneous offense, and also by ignoring the fact that the evidence admitted at trial was sufficient to prove that appellant had committed the extraneous offense beyond a reasonable doubt?

7. Did the court of appeals err in holding the trial court abused its discretion in admitting evidence of other crimes pursuant to rule 404(b) when the evidence in question was actually admissible as same transaction contextual evidence?

4. The trial court erred in admitting a graphically sexual letter written to defendant by a man she had never met.

***Abdygapparova v. State*, 243 S.W. 3d 191 (Tex. App.–San Antonio 2007, pet. filed)**

The trial court admitted a letter written to defendant by a man containing his very graphic sexual fantasy, to prove that she, the defendant, was sexually interested in women.

> The letter sent to Abdygapparova by a man, living in another state and whom she had never met, outlining his sexual desires and fantasies with Abdygapparova and other women, does not tend to make *anything as to Abdygapparova*, much less her sexual orientation or whether she committed sexual assault, any more or less probable and is therefore not relevant. [emphasis in original]

GUILTY PLEAS

1. Adding a deadly weapon finding violated the plea agreement.

***Vara v. State*, 2008 WL 138715 (Tex. App.–San Antonio 2008, no pet. h.)(not designated for publication)**

In the written plea agreement the state agreed to recommend 5 years, oppose appellant's application for probation and deferred, and seek restitution. The trial court followed the recommendation and sentenced appellant accordingly, but returned to the bench an hour later and added a deadly weapon finding.

The trial court violated the plea agreement by adding the deadly weapon finding. The written plea agreement had said nothing about a deadly weapon finding. Although appellant had been given written notice that the state would seek a deadly weapon finding if the case went to trial, the indictment did not allege a deadly weapon.

"The record reflects that the trial court accepted and approved a plea bargain agreement that did not include a deadly weapon finding. The court sentenced Vara in accordance with the approved plea agreement. The subsequent addition of a deadly weapon finding was an impermissible breach of the agreement. Accordingly, we delete the deadly weapon finding from the judgment."

2. "Take the deal." (Immediately.)

***Montez v. State*, 2007 WL 2608528 (Tex. App.–San Antonio 2007, pet. ref'd)(not designated for publication)**

The jury was initially unable to agree on guilt, and the court gave an "Allen charge." While the jury continued to deliberate, the state offered 10 years deferred, and appellant agreed. Appellant had not yet signed all the paperwork when the jury buzzed twice, signaling that it had a verdict. The prosecutor withdrew its plea bargain offer, the jury found appellant guilty of aggravated robbery, and later sentenced him 30 years imprisonment.

A defendant has the absolute right to withdraw his not-guilty plea at any time, as a matter of right, before the jury has retired, but after that, withdrawal is within the court's discretion. Here, the trial court had not accepted the plea bargain in open court, and therefore acted within its discretion by not allowing Montez to withdraw his not-guilty plea.

HABEAS

1. Don't ask, suggest.

***Ex parte Moreno*, 2007 WL 2019745 (Tex. Crim. App. 2007)**

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the United States Supreme Court recognized that the two statutory special issues do not provide a vehicle for the proper consideration of all mitigating circumstances in death penalty cases. In *Penry*, the relevant mitigating circumstances that were beyond the scope of the special issues were child abuse and mental retardation.

Jose Moreno was tried and sentenced to death in 1987, two years before the original *Penry* decision. His trial lawyers, though were smart enough to anticipate the *Penry* decision, and they made the appropriate objections to the court's punishment charge. The objections were overruled by the trial court.

Moreno next raised the issue in his state writ of habeas corpus before the Texas Court of Criminal Appeals, in 1996. That court denied habeas relief in 2000, holding that Moreno's evidence was not really mitigating in the way that Penry's was. Federal habeas relief was also denied.

In 2007, the United States Supreme Court decided two cases – *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007) and *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007) – which held that the court of criminal appeals and the Fifth Circuit had been misinterpreting *Penry* for years, and that in fact, evidence of an unhappy childhood might be beyond the scope of the special issues, even if there was no abuse involved.

In May, 2007, just before his scheduled execution, Moreno's lawyers filed a subsequent writ of habeas corpus in state court asserting that he was entitled to relief in view of the *Abdul-Kabir* and *Brewer* decisions. The day before his execution was to happen, the court of criminal appeals denied relief.

The next day, the day the execution was scheduled for, Moreno's lawyers filed a "suggestion" that his original state writ, which had been filed in 1996 and denied in 2000, be reheard on the court's own motion, as provided by Rule 79.2 of the Texas Rules of Appellate Procedure. The court granted this suggestion and stayed Moreno's execution.

Several months later, Moreno was granted relief. "In this cause, we take the unusual step of reconsidering, on our own initiative, a claim raised in an initial

post-conviction application for writ of habeas corpus in a capital murder case, but rejected by this court in an order issued in 2000." In doing so, the court of criminal appeals admitted it had been "so plainly incorrect . . . as to have been 'objectively unreasonable.'" A new punishment trial ordered for Moreno after he had spent 21 years on death row.

***Ex parte Reynoso*, 2007 WL 2660265 *1 (Tex. Crim. App. 2007)(not designated for publication)**

Rule 79.2(d) of the Texas Rules of Appellate Procedure prohibits a party from moving for rehearing after the court of criminal appeals denies habeas relief under article 11.07 or 11.071. "The Court may on its own initiative reconsider the case."

In this case, applicant's initial application was overruled because he filed it untimely. He then filed a "suggestion" that the court reconsider on its own initiative its earlier decision to deny relief, and the suggestion was taken. The parties were ordered to brief whether the application was timely filed in view of TRAP rule 4.1(a), which concerns filing on Saturdays, Sundays, and holidays.

HEARSAY

1. Officer's contemporaneous observations on video do not constitute "present sense impressions."

***Fischer v. State*, 2008 WL 141850 (Tex. Crim. App. 2008)**

"This case presents a novel question in Texas evidentiary law: Are a law enforcement officer's factual observations of a DWI suspect, contemporaneously dictated on his patrol-car videotape, admissible as a present sense impression exception to the hearsay rule under Tex. E. Evid. 803(1)? They are not. An officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative. This calculated narrative in an adversarial setting was a speaking offense report. It was not the type of unreflective, street-corner statement that the present sense impression exception to the hearsay rule is designed to allow."

The officer conversed with appellant, then administered the field sobriety tests. Four times during his investigation the officer stopped and walked to his patrol car, where he dictated findings, such as his observations of appellant ("glassy eyes," "slurred speech," "strong odor"), appellant's performance on the field sobriety tests, and an item seen in appellant's car.

"In sum, most of the statements made by Trooper Martinez on the videotape constituted a calculated narrative in an adversarial, investigative setting. FN53 These particular statements may be entirely reliable ones, but the setting is one that human experience and the law recognizes is brimming with the potential for exaggeration or misstatement."

2. Are statements made to one who is a licenses professional counselor, but not a medical doctor, admissible under Rule 803(4) of the Rules of Evidence?

***Taylor v. State*, 2007 WL 2214859 (Tex. App.–Houston [1st Dist.] 2007, pet. granted)**

The trial court admitted testimony in this aggravated sexual assault case from a licensed professional counselor who was not a medical doctor, or working for a medical doctor, under rule 803(4) of the Texas Rules of Evidence, the medical diagnosis exception to the hearsay rule.

The court of appeals affirmed. The complainant testified that she was receiving therapy for post-traumatic stress disorder, and it is reasonable to infer that she understood she was receiving therapy to treat a medical condition resulting from the sexual assault. The testimony was therefore admissible under Rule 803(4).

The court of criminal appeals granted appellant's petition for discretionary review on November 14, 2007 to determine this: "Are statements made to a "licensed professional counselor" admissible under texas rule of evidence 803(4)?"

HOMICIDE

1. Does it violate equal protection to prosecute the father for killing an unborn child, but not the mother?

***Flores v. State,* 2008 WL 375421 (Tex. Crim. App. 2008)**

Flores was charged with capital murder for killing his pregnant girlfriend's twin fetuses by stepping on her abdomen. The girlfriend testified that she asked him to help her terminate her pregnancy by stepping on her abdomen and he did so twice. She also testified that she did a number of things herself to induce the abortions, including striking herself more than 10 times, and, against her doctor's advice, jogging and not taking prenatal vitamins. Experts testified that the pregnancy could have been terminated either by the mother striking herself, or by her being stepped on, or by some genetic abnormality.

The state's theory was that the fetuses died as a result of Flores's abusive behavior, and that the mother had not, in fact, either requested or consented to the abuse.

The mother was never charged. The governing Texas statute allows the prosecution for murdering an "unborn child," but exempts the mother and a physician who performs a lawful medical procedure. Flores complained on appeal that it violated the Equal Protection Clause to prosecute him for assisting a pregnant woman to obtain an abortion, but not the pregnant woman.

The court disagreed, finding that the constitutional question could be avoided because there was ample evidence from which a rational jury could have found appellant was not acting at the mother's request, but instead was just abusing her.

Judge Cochran concurred, but did note that appellant made "several strong arguments concerning the potential unconstitutionality of Section 19.05 of the Penal Code as it applies to the prosecution of one who assists a pregnant woman to lawfully obtain an abortion." For example:

> [T]he plain language of the statute might well be read to make anyone who assisted the woman or the physician in that lawful act subject to prosecution for capital murder under the law of parties: the woman's mother, father, or friend who drives the woman to the doctor's office or provides the money for a lawful abortion with the intent that the woman obtain such an abortion; the unlicensed medical assistant who helps the licensed doctor in performing the abortion; or, as appellant claims in this case, the father of an unborn child who assists in an unorthodox procedure that intentionally leads to a miscarriage.

2. It does not violate due process to criminalize the murder of an unborn victim.

***Lawrence v. State*, 240 S.W. 3d 912 (Tex. Crim. App. 2007)**

"The issue in this case is whether the provisions of the Texas Penal Code that prohibit the murder of an unborn victim violate due process. The answer is "no." Consequently, we shall affirm the judgment of the court of appeals.

IMPEACHMENT

1. Can cases taken into consideration and dismissed under § 12.45 be used for impeachment?

***Lopez v. State*, 230 S.W. 3d 845 (Tex. App.–Eastland 2007, pet. granted)**

The trial court admitted two prior offenses that had been taken into consideration and dismissed under § 12:45 of the Texas Penal Code, to impeach appellant a subsequent trial. The Eastland Court of Appeals dismissed. "Offenses considered under Section 12.45 do not meet the requirement of Rule 609 that a witness had been 'convicted' of those crimes."

The Tyler court of appeals reached the opposite conclusion in *Perea v. State*, 870 S.W.2d 314, 318 (Tex. App.– Tyler 1994, no pet.).

The court of criminal appeals granted the state's petition for discretionary review in *Lopez* on December 5, 2007 to determine the following: "The Court of Appeals erred in holding that the appellant could not be impeached with two prior offenses that had been taken into account in the assessment of punishment in a previous case pursuant to section 12.45(a), Texas Penal Code."

2. What to do if your own witness non-responsively volunteers good character evidence that might open the door to bad character rebuttal from the state.

***Harrison v. State*, 241 S.W. 3d 23 (Tex. Crim. App. 2007)**

Charged with murdering his son, Harrison put on a witness, apparently to testify that he had displayed a good character around her children. She went a little beyond that testimony, though, when she volunteered that Harrison was "a sweet person, . . . a good person." The state argued that this opened the door to allow it to ask the witness if she was aware that Harrison had previously been convicted and cited for assault, and the trial court agreed.

The court of criminal appeals affirmed. When a defendant offers good-character evidence, the state can rebut it with evidence showing that his character is not good. That the good-character evidence was not intentionally elicited, or that it was nonresponsive, does not change the character of the defense evidence.

The *Harrison* case distinguished *Smith v. State*, 763 S.W. 2d 836 (Tex. App.–Dallas

1988, pet. ref'd). There the defense called an eyewitness to the crime, and on cross-examination, he volunteered that he had known the appellant for about a year, and " I have never known him to be in any kind of trouble." Immediately the defense lawyer told the witness not to give any non-responsive answers, then objected that the previous answer was non-responsive. The lawyer informed the court that he had instructed his witnesses not to give unresponsive answers. Over the defense's objection, the prosecution was then allowed to ask the witness "have you heard" questions concerning prior misconduct by appellant. The Dallas court of appeals reversed, holding that, in light of appellant's objection, the trial court erred both in not striking the non-responsive answer, and in allowing the state to impeach the witness with "have you heard" questions. *Id*. at 844.

Harrison acknowledged *Smith*, but held that it did not apply here, because "[n]one of the reasons listed by the *Smith* court for its decision are present in the case before us." Specifically, the defense never claimed to have instructed the witness not to volunteer testimony, nor did he request that the testimony be stricken.

> We do not address whether the outcome would be different if the defense had objected to the nonresponsive statement or asked that it be stricken from the record and removed from the jury's consideration.

Harrison v. State, 241 S.W. 3d 28, n. 4.

3. Impeaching a witness with a prior inconsistent statement is not necessarily an attack on truthfulness that will invite rehabilitation with evidence of character for truthfulness.

***Michael v. State*, 235 S.W. 3d 723 (Tex. Crim. App. 2007)**

After the defense impeached the nine year old complainant with several of her prior inconsistent statements, the state brought in her former teacher and babysitter who testified that she had a good character for truthfulness. This was error. "Impeaching a witness with a prior inconsistent statement is not necessarily an attack on credibility that would allow rehabilitative evidence of character for truthfulness under Rule of Evidence 608(a)." Good character evidence for truthfulness can be used when the witness's character for truthfulness has been attacked. Generally, character for truthfulness may be rehabilitated only when the witness's general character for truthfulness has been attacked. Impeachment is normally just an attack on the witness's accuracy, not his character for truthfulness. Rehabilitation will be permitted, however, when the overall tone and tenor of the cross-examination implies that the witness is a liar.

4. Leaving a false impression does not always open the door to prior misconduct.

***Winegarner v. State*, 235 S.W. 3d 787 (Tex. Crim. App. 2007)**

Appellant was charged with assaulting his wife. During the wife's testimony she volunteered that: " And I'm not crazy enough to hit a man or start a fight." Appellant argued that this testimony created a false impression, and opened the door to admission of evidence about a prior incident in which the complainant had been placed on deferred adjudication for assaulting one Knaish, a former husband.

A majority of the court – comprised of Judges Holcomb, Price, Womack, Johnson, and Cochran – disagreed, and affirmed the conviction. Although the Texas Rules of Evidence are "intentionally slanted toward the inclusion of all relevant evidence," the trial court has considerable discretion to exclude this evidence under Rule 403.

> Given the evidence before the trial court concerning the nature and considerable remoteness of Ms. Winegarner's assault on Knaish, the trial court could have reasonably concluded that the probative value, if any, of the impeachment evidence offered by appellant was substantially outweighed by the danger of unfair prejudice or confusion of the issues or by considerations of undue delay.

Interestingly, Presiding Judge Keller, joined by Judges Hervey and Keasler, dissented, believing that the trial court abused its discretion because "[t]he complaining witness in this case left the jury with a false impression about a matter that went to the heart of the defense."

5. Using an attorney's discovery notes for impeachment.

***Cameron v. State*, 241 S.W. 3d 15 (Tex. Crim. App. 2007)**

Cameron's first attorney reviewed a police report in the state's file, and noted that this handwritten report said a certain truck was white. The second time the lawyer reviewed the file, the handwritten note had been replaced by a typewritten report that claimed the truck was dark blue. Cameron's trial attorney wanted to call the first attorney to testify about the notes, to show that he had seen two different police reports that had conflicting information regarding Cameron's truck. The trial court asked the trial lawyer if he was willing to waive his attorney-client privilege, and, when he said his request did not require any kind of waiver and that he would not waive the attorney-client privilege, the trial judge excluded the evidence.

This was error. "Appellant sought to impeach the credibility of the witness's testimony about the drug transaction by establishing that the police had given conflicting descriptions of the truck and had possibly even altered the offense report. Therefore, the evidence was relevant for impeachment purposes."

The court of appeals held the excluded evidence was not subject to the attorney-client privilege, but rather the work product privilege, and that therefore the defense waived error because it did not effectively inform the trial court of their objection.

The court of criminal appeals disagreed. "Appellant offered the testimony of the former attorney and responded to the legal objections raised by the State and the trial court by saying that he did not believe that any waiver was required, which preserved the trial court's error in failing to admit the evidence. The court of appeals erred in holding that error was not preserved."

6. A letter written by another person cannot be used to impeach the defendant.

***Abdygapparova v. State*, 243 S.W. 3d 191 (Tex. App.–San Antonio 2007, pet. filed)**

The state argued that a letter written to defendant by a man she had never met was admissible to impeach her testimony that she had never had sex with a woman. Rule 613(a), though, pertains to things written by the witness.

> Here, the statement offered by the State is an unauthenticated letter, written by a third party and sent to Abdygapparova at the county jail. Thus, because the statement was not her own, the trial court erred in admitting the evidence under Rule 613.

JUDICIARY

1. Clearly a case in which the trial judge's impartiality robbed the defendant of her "basic protections."

***Abdygapparova v. State*, 243 S.W. 3d 191 (Tex. App.–San Antonio 2007, pet. filed)**

> Abdygapparova complains that the prosecutor and the trial court exchanged numerous "notes" during the voir dire process. These notes discussed Abdygapparova's ability to communicate with her counsel, defense

counsel's voir dire of at least two of the venire members, the hairstyle of one of the venire members, the State's presentation of the law to the venire, the prosecutor's line of questioning of one of the venire members, time limits on voir dire, and an update on unrelated proceedings in the courthouse.

* * *

[T]hese comments were examples, inter alia, of the trial court providing guidance to the prosecutor on the presentation of his case and discussions regarding the trial court's initial ruling regarding Abdygapparova's ongoing request for an interpreter. As such, they extended beyond the realm of courtroom administration and etiquette, for which the trial court has control, and became strong evidence of bias and partiality.

* * *

Here, the trial judge knew or should have known that engaging in written communications with the State regarding potential jurors, defense counsel's voir dire questions and presentation of argument, all in the presence of potential jurors, was improper. Tex.Code Jud. Conduct, Canon 3(B)(8), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. B. We further acknowledge that it is the duty of all prosecutors, not to convict, “but to see that justice is done.” The secretive nature and content of the ex parte notes show a bias on the part of the trial court to favor the prosecution, even going so far as to make recommendations on the presentation of its case. As such, the trial judge became an advocate for the State, and an opponent of the defense, in direct conflict with her judicial requirement of absolute impartiality, precluding Abdygapparova from receiving a fair and impartial trial. [some citations omitted]

* * *

This is clearly a case in which the absence of an impartial trial judge on the bench infected the entire trial process, robbing Abdygapparova of her basic protections and undermining the ability of the criminal trial to reliably serve its function as a vehicle for the determination of guilt or innocence. See Because “the right violated [in this case] was the right to an impartial judge, which is structural error, a harm analysis is not warranted.” [citations omitted]

2. Does the state benefit by invoking the name "Charles Baird?

***Tucker v. State*, 221 S.W. 3d 780 (Tex. App.–Corpus Christi 2007, pet. granted)**

Charles Baird was a judge on the Texas Court of Criminal Appeals for eight years, and, in my opinion, he did an excellent job. After losing the election in 1998 to Judge Michael Keasler**,** Judge Baird sat from time to time as a visiting Judge on the Corpus Christi Court of Appeals, and recently was elected to the 299th Judicial District Court in Travis County. I have heard it said that the state is almost guaranteed to have its petition for discretionary review granted on any case decided by Judge Baird when he visited with the Corpus Court. Surely not, I thought. This is obviously false; a recent survey on Westlaw disclosed only 11 grants (out of 103 cases). A high percentage to be sure, but not a guarantee.

Apparently, though, some prosecutors still labor under this misconception. What else could explain a recent petition from the Harris County District Attorney's office in *Tucker v. State*, No. 07-0742, the first ground of which is this: "*Assigned Judge Charles Baird* and the lower court of appeals erred in holding that the evidence was legally insufficient to show that a deadly weapon was used during the assault when the appellant stabbed his wife completely through her arm and again on her neck with an unknown object."

3. Judicial civility should not be an oxymoron?

***Pena v. State*, 226 S.W.3d 634 (Tex.App.-Waco 2007, pet. granted)**

In this case, which has already been to the court of criminal appeals once, and is headed there again, two Justices on the Waco Court of Appeals held that the due course of law provision of the Texas Constitution provides more protection than the due process clause of the United States Constitution with regard to a claim that the state destroyed potentially exculpatory evidence.

The case is obviously causing some hard feelings within that Court. Chief Justice Gray dissented and accused the majority of glossing over two dispositive issues "in order to publish its thirty-six page, mediocre law-review article on the merits of Pena's issues under the Texas Constitution." Chief Justice Gray saw little if any difference between his brethern's opinions in *Pena I* and *Pena II*, and used this quote from the Bible: ""As a dog returns to its vomit, so a fool repeats his folly." Proverbs 26:11."

JURY CHARGES

1. Trial court not required to instruct the jury that it could consider prior verbal threats when considering the issue of self-defense.

***Walters v. State*, 2007 WL 4245387 (Tex. Crim. App. 2007)**

The only disputed issue in this case was whether appellant acted in self-defense, and the trial court instructed the jury on the law of self-defense. The court, however, refused to instruct the jury that it could consider prior verbal threats from the deceased when deciding whether appellant acted in self-defense.

The court of criminal appeals held that the trial court did not err in refusing to instruct on prior verbal threats. In so ruling, the court overruled a line of cases dating back at least as far back as 1929 which held that, when there is evidence that a complainant verbally threatened the defendant, the court should instruct the jury to consider not only the complainant's acts, but also his verbal threats.

Article 36.14 requires the trial court to instruct the jury on the law applicable to the case. "This law requires the trial judge to instruct the jury on statutory defenses, affirmative defenses, and justifications whenever they are raised by the evidence." According to the court, since 1974 it has "slowly recognized" that the Legislature does not intend the defense to get instructions on defensive theories not expressly set out in the Penal Code. No instruction need be given on defensive theories that merely negate an element of the state's case, such as alibi, accident, good faith, suicide, independent impulse, and alternative cause. "The question here is whether this line of cases-each dealing with a non-statutory defense-applies to an instruction that relates to a statutory defense, but is based on a statutory provision that was repealed in the 1974 Penal Code."

According to the court, recent cases reflect the Legislature's policy "to simplify the criminal law and the jury instructions."

> Juries may consider and evaluate the evidence in whatever way they consider it relevant to statutory offenses and defenses. The policies reflected in the 1974 Penal Code and in the *Giesberg* line of cases, persuade us that special, non-statutory instructions, even when they relate to statutory offenses or defenses, generally have no place in the jury charge.

* * * *

"[W]e hold that, generally speaking, neither the defendant nor the State is entitled to a special jury instruction relating to a statutory offense or defense if that instruction (1) is not grounded in the Penal Code, (2) is covered by the general charge to the jury, and (3) focuses the jury's attention on a specific type of evidence that may support an element of an offense or a defense. In such a case, the non-statutory instruction would constitute a prohibited comment on the weight of the evidence.

An instruction on prior verbal threats is inappropriate because it meets all three criteria.

What about instructions on *apparent danger*? ["It is not necessary that there be an actual attack or attempted attack, a person is justified in using force against another in self-defense from apparent danger to the same extent as he would be had the danger been real, provided that he acted upon a reasonable belief that the other person was using or attempting to use unlawful force, and that he reasonably believed the use of force was immediately necessary to protect himself against the other person's use or attempted use of unlawful force against him."] The court did not decide this, noting that "[t]he propriety of this common-law . . . instruction is not before us. . . ."

2. Trial court has no duty to instruct on the state's burden of proving extraneous offenses beyond a reasonable doubt absent a request from the defense.

***Delgado v. State*, 235 S.W. 3d 244 (Tex. Crim. App. 2007)**

The trial court need not, *sua sponte*, instruct the jury that the state has the burden of proving beyond a reasonable doubt that appellant committed extraneous misconduct. Although it is the trial court's absolute *sua sponte* duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged, there is no similar *sua sponte* duty to instruct the jury on all potential defensive issues, lesser included offenses, or evidentiary issues, because the latter often depend on trial strategy and tactics.

"[A] limiting instruction concerning the use of extraneous offense evidence should be requested, and given, in the guilt-stage jury charge only if the defendant requested a limiting instruction at the time the evidence was first admitted. When the defendant has properly requested a limiting instruction in the jury charge, the trial court must also include an instruction on the State's burden of proof at that time."

The law is different at the *punishment* phase of a non-capital trial, because there, article 37.07 is the applicable law. "Thus, the trial judge must *sua sponte* instruct the jury at the punishment phase concerning that law, including the fact that the State must prove

any extraneous offenses beyond a reasonable doubt."

3. The defense does not have the burden of showing harm in an *Almanza* analysis.

***Warner v. State*, 2008 WL 375503 (Tex. Crim. App. 2008)**

Appellant was charged in a three paragraph indictment with aggravated sexual assault of a child. The first paragraph alleged penetration by his finger; the second alleged causing contact between sexual organ and mouth; the third paragraph alleged contact between the anus and sexual organ. The application paragraph of the court's charge submitted the three counts disjunctively, allowing the jury to convict if it found any of the three different methods.

Appellant complained on appeal that the disjunctive submission precluded a unanimous jury verdict. The court of appeals agreed that there was charge error, but found that appellant failed to meet his burden of showing he had suffered "egregious harm," as required by *Almanza*.

The court of criminal appeals held that the court of appeals erred when it placed the burden on appellant to show harm.

> To dispel any lack of clarity in our cases, we affirm that burdens of proof or persuasion have no place in a harm analysis conducted under Almanza. Because the Court of Appeals placed a burden of proof on the appellant, we shall remand the case to the Court of Appeals for a review of the record, giving consideration to the fact that neither party has a burden to show harm.

4. You waive the right to a limiting instruction in the court's charge if you do not request that instruction at the time the evidence is admitted.

***Chuber v. State*, 2007 WL 4180162 (Tex. App.–San Antonio 2007, no pet.)(not designated for publication)**

Ms. Canfield testified that she and Chuber were driving to Austin to visit his parole officer when he was arrested for DWI. "Although this evidence of extraneous wrongdoing would likely have merited a limiting instruction, Chuber did not object at the time the comment was made, but instead requested an instruction in the jury charge during the charge conference. To obtain a limiting instruction, Chuber needed to object at the first opportunity. [citation omitted] Chuber's requested jury charge instruction was not

warranted because he failed to object and request a limiting instruction when he first had the opportunity to do so: when Canfield testified."

MOTION FOR NEW TRIAL

1. God's word is harmless.

***Lucero v. State*, 2008 WL 375416 (Tex. Crim. App. 2008)**

Romans 13:1-6 says this:

> Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God.2 Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.

Near the beginning of punishment deliberations, a "straw poll" indicated that 10 jurors favored a death sentence and 2 did not. The foreperson then read to the other jurors from the passage from Romans. Some time thereafter the jurors voted unanimously to sentence appellant to death.

Appellant's lawyer filed motions for new trial, supported by affidavits from two jurors, alleging that the jurors had been subjected to "outside influence." The trial court denied the motions without a hearing, and appellant appealed.

The court of criminal appeals affirmed, finding "it unnecessary to decide whether the jury foreman's Bible reading in this case was an 'outside influence,' because this record presents no 'reasonable grounds' that this Bible reading affected the jury's verdict.

[citation omitted] The record presented to this Court indicates that this brief reading of Biblical scripture, which was essentially an admonishment to follow man's law (and, therefore, duplicated what was already in the court's charge), occurred near the beginning of jury deliberations. The affidavits clearly indicate that the scripture had no effect on the jury's verdict rendered some hours later. We, therefore, cannot conclude that the trial court abused its discretion in declining to hold a hearing on appellant's new trial motions. For the same reason, any constitutional error that appellant may have preserved as a result of this Bible reading was harmless beyond a reasonable doubt."

OPTIONAL COMPLETENESS

1. Trial court erred when it admitted only a part of the 911 call.

***Walters v. State*, 2007 WL 4245387 (Tex. Crim. App. 2007)**

Appellant called 911 to report that he had just shot his brother, and a police officer called him back and asked if he wanted to talk about it. The policeman so testified in court, but before he could finish his answer, the prosecutor "redirected" him and guided his answer to another subject. When the defense asked on cross-examination how appellant had responded to the request to talk about it, the prosecutor objected that this was hearsay, and the trial court sustained the objection and excluded the answer.

This was error. The defense was entitled to have the jury hear the entire 911 call, to rebut the prosecution's false impression that he had not given any explanation of the shooting after it had happened, and that he had been unnaturally calm.

The rule of optional completeness "permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter 'opened up' by the adverse party."

> It is designed to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing. Rule 107 does not permit the introduction of other similar, but inadmissible, evidence unless it is necessary to explain properly admitted evidence. Further, the rule is not invoked by the mere reference to a document, statement, or act. And it is limited by Rule 403, which permits a trial judge to exclude otherwise relevant evidence if its unfair prejudicial effect or its likelihood of confusing the issues substantially outweighs its probative value.

PLEA BARGAINING

1. Trial court erred in letting prosecutor cross-examine defendant about statements she had made during plea negotiations.

***Abdygapparova v. State*, 243 S.W. 3d 191 (Tex. App.–San Antonio 2007, pet. filed)**

Appellant testified on direct examination that her statement dated April 5 was not her complete recollection of the events, and that she had left some details out, and she had mentioned this to her lawyers and to the prosecutor. The prosecutor then argued that she had opened the door, and convinced the trial judge to allow extensive cross-examination on conversations he had had with appellant during their plea negotiations.

This was error. Appellant's answers did not open the door. Instead, the state's cross was an effort to maneuver her to open the door. Nor were the plea negotiations something the prosecution could use to impeach appellant, since she had not first broached this subject with the jury. Rule 410 protects statements made during plea bargaining. It bars the use of statements made during plea negotiations for impeachment. "Only when the defendant offers statements made during plea bargain discussions may the State, in the interest of fairness, offer other statements made during the same plea bargain discussions." [emphasis in original]

PUBLICITY

1. Gag order stricken.

***In re Benton*, 238 S.W.3d 587 (Tex. App.–Houston [14th Dist.] 2007, no pet.)**

After Benton's first trial in Houston ended in a mistrial, the state sought, and was granted a gag order prohibiting the defendant and the attorneys from commenting on a variety of topics in the press during the pendency of the retrial. Benton sought a writ of mandamus, which the court of appeals granted, vacating the gag order because the evidence and the trial court's findings did not establish "that the order was narrowly tailored to avert a substantial likelihood of material prejudice."

Mandamus is the proper way to challenge a gag order.

The court recognized that the Texas Constitution might provide greater protection than the Federal Constitution, but saw no need to conduct a separate constitutional

analysis, because, even under the least protective measure, the gag order was unconstitutional. *Cf. San Antonio Express-News v. Roman*, 861 S.W. 2d 265, 268 (Tex. App.–San Antonio 1993, no pet.)(finding that the state constitution provides greater protection, and that the gag order which prevented the media from publishing the names of two juvenile witnesses imposed there violated Article I, § 8 of the Texas Constitution)

RECKLESSNESS

1. Bad mothers are not all criminals.

***Williams v. State*, 235 S.W. 3d 742 (Tex. Crim. App. 2007)**

Appellant took her two young children from their grandmother's house, which had working utilities, to her boyfriend's temporary home, which had no utilities, and left them in his care with a lit candle in the bedroom, while she went out with a friend. The candle caught the house on fire, the children died, and the state charged the mother with reckless injury to the children.

The court of criminal appeals found the evidence legally insufficient. In so deciding, the court exhaustively analyzed the evidence and authorities from Texas and other states on culpable mental states.

> Appellant may have been a "bad" mother, unworthy of her mother, her children, and her boyfriend, but she did not commit the crime of reckless injury to a child merely because she took her children from a house with utilities to one without utilities, and left them, under the care of a responsible adult, with a lit candle in the bedroom.

2. Recklessness must be alleged with reasonable certainty.

***State v. Rodriguez*, 2008 WL 506273 (Tex. App.–San Antonio 2008, no pet. h.)(not designated for publication)**

The information charged that appellee did "recklessly discharge a firearm inside the corporate city limits of a municipality having a population of One Hundred Thousand (100,000) or more, namely: the City of San Antonio, by pulling the trigger on a firearm which contained ammunition and was operable." Appellee filed a motion to set aside this information asserting that it did not allege any act with reasonable certainty that would show he acted recklessly, in violation of article 21.15 of the Code of Criminal Procedure. The trial court agreed, and the state appealed.

The court of appeals affirmed, rejecting the state's assertion that the information was sufficient simply because it alleged Rodriguez pulled the trigger of a loaded gun containing operable ammunition. "The State's information, however, did not inform Rodriguez of the circumstances that indicate he pulled the trigger of a loaded firearm in a reckless manner." Pulling the trigger of a loaded firearm within city limits is not reckless per se.

SEARCH AND SEIZURE

1. The purpose and an application of Texas's exclusionary rule.

***Miles v. State*, 241 S.W. 2d 28 (Tex. Crim. App. 2007)**

"The Texas Legislature enacted an exclusionary rule broader than its federal counterpart precisely because of the *Welchek* scenario and the 'widespread problem of vigilante-type private citizens [acting] in concert with the police conducting illegal searches for whiskey.'"

> Thus, the plain language and history of Article 38.23 lead to an inescapable conclusion: if an officer violates a person's privacy rights by his illegal conduct making the fruits of his search or seizure inadmissible in a criminal proceeding under Article 38.23, that same illegal conduct undertaken by an "other person" is also subject to the Texas exclusionary rule. If the police cannot search or seize, then neither can the private citizen. Conversely, if an officer may search or seize someone under the particular circumstances, then the private citizen's equivalent conduct does not independently invoke the Texas exclusionary rule, and the evidence obtained by either the officer or the private person may be admissible.

"None of these cases was explained on this basis, but this rule-that a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do-would explain the outcome in each case and is consistent with the purpose of Article 38.23. We conclude that the historical rationale for including unlawful conduct by an "other person" under the Texas exclusionary statute is best explained and implemented by this rule."

> Based on the history and purpose of Article 14.01(a), as well as precedent, we reaffirm the reasoning in Woods and conclude that a citizen may make a warrantless arrest of a person who commits a misdemeanor within the citizen's presence or view if the evidence shows that the person's conduct

> poses a threat of continuing violence or harm to himself or the public. It is the exigency of the situation, not the title of the offense, that gives both officer and citizen statutory authorization to protect the public from an ongoing threat of violence, harm, or danger by making a warrantless arrest.

"For purposes of Article 38.23(a), the issue is whether Mr. Moore was legally authorized to make a citizen's arrest under these particular circumstances, and whether he effectuated that arrest in a reasonable manner-a manner that a peace officer, standing in the citizen's shoes, could have legally done under the Fourth Amendment-and without significantly increasing the risk of danger and harm to the public welfare."

2. Continued detention was unjustified after traffic stop was completed with no reasonable suspicion of criminal activity.

***St. George v. State*, 237 S.W. 3d 720 (Tex. Crim. App. 2007)**

Appellant was the passenger in a car that was stopped for having an inoperative license plate light. The driver identified herself to one officer, and appellant identified himself – with a false name – to the other officer. The license and warrant checks came back clear for the driver, but the dispatcher reported that there was no record of a driver's license matching the name and date of birth given by appellant. Approximately nine minutes into the stop the driver was given a warning ticket for the equipment violation. While this warning was being explained, another officer asked appellant if his driver's license was expired and he said it was. Then they learned appellant's true name, and a check revealed that he had outstanding traffic warrants. Ten minutes after the driver received the warning ticket, appellant was arrested, and a search incident to arrest revealed marijuana in his pocket. The trial court overruled his motion to suppress.

The court of criminal appeals reversed the trial court. When the officers issued the driver the warning ticket, they did not have specific articulable facts to believe that appellant was involved in criminal activity, so questioning him regarding his identity and checking him for warrants "without separate reasonable suspicion, went beyond the scope of the stop and unreasonably prolonged its duration." Although the police would not need reasonable suspicion if the encounter were consensual, here it clearly was not. Rather, after the citation was issued to the driver, the officers told appellant several times that they needed his name and date of birth before he could leave. He finally told them that they were questioning someone not driving the car, that the driver had been ticketed, and that there shouldn't be any other problem. The court of criminal appeals agreed with appellant's assessment.

3. Can vehicles always be searched without warrant following the driver's arrest?

***Arizona v. Gant*, No. 07-542**

On February 25, 2008, the United States Supreme Court granted certiorari to consider this question: "Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

SENTENCING

1. The new "advisory" federal sentencing guidelines.

***Gall v. United States*, 128 S. Ct. 586 (2007)**

"We now hold that, while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences-whether inside, just outside, or significantly outside the Guidelines range-under a deferential abuse-of-discretion standard. We also hold that the sentence imposed by the experienced District Judge in this case was reasonable."

***Kimbrough v. United States,* 128 S. Ct. 558 (2008)**

"The question here presented is whether, as the Court of Appeals held in this case, 'a sentence ... outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.' [citation omitted] We hold that, under Booker, the cocaine Guidelines, like all other Guidelines, are advisory only, and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory. A district judge must include the Guidelines range in the array of factors warranting consideration. The judge may determine, however, that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing. 18 U.S.C. § 3553(a) (2000 ed. and Supp. V). In making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses."

2. Can a sentence within the statutory range be "cruel and unusual" in Texas?

***Whitehead v. State*, 2006 WL 3685230 (Tex. App.–Eastland 2007, pet. granted)**

Appellant was out on bond, his sentence delayed so he could spend some time with his father, who was dying of cancer. He failed to appear when scheduled, but called the chief deputy the next day and asked that he pick him up at his home and arrest him, which the deputy did. He told his sister he wanted to hug his father one more time. Appellant was convicted of bail jumping and failure to appear, habitual, and sentenced to life imprisonment.

The Eastland Court of Appeals rejected appellant's complaint that his sentence was cruel and unusual under the Eighth Amendment to the United States Constitution and Article I, § 13 of the Texas Constitution, and that the evidence was factually insufficient.

The Texas Court of Criminal Appeals granted appellant's petition for discretionary review on May 2, 2007 to decide:

> 1. Where Mr. Whitehead's sentence violated his rights as guaranteed under the Eighth Amendment to the Constitution of the United States, and Article I, section 13 of the Texas Constitution, as it was disproportionate to his crime, the court of appeals erred in upholding the trial court's imposition of that sentence.
>
> 2. Where the finding that Mr. Whitehead did not have a reasonable excuse for his failure to appear in accordance with the terms of his release is factually insufficient, the court of appeals erred in affirming the conviction.

3. Can the trial court assess 180 days in jail as a condition of probation *after* hearing the victim impact statement.

***Johnson v. State*, 240 S.W. 3d 76 (Tex. App.–Austin 2007, pet. granted)**

The jury found appellant guilty of indecency with a child and recommended five years probation. After the trial court imposed the probated sentence several witnesses were permitted to give victim impact statements as permitted by article 42.03, § 1(b) of the code of criminal procedure. Immediately after this the court imposed 180 days in jail as a condition of probation.

On appeal appellant complained that the 180 days were imposed after the victim impact statements, in violation of article 42.03, § 1(b). The court of appeals acknowledged that the purpose of this statute is to "alleviate any risk that the statement might affect the partiality of the fact finder at the punishment phase." Even so, there was no problem here. The judge has discretion to impose jail time as a condition at any time

during the supervision period. At most, then, this was harmless error.

The court of criminal appeals granted appellant's petition for discretionary review on January 16, 2008 to determine this: "The Court of Appeals erred in holding that a trial court can, under article 42.12 § 12(c) of the code of criminal procedure, modify the conditions of a defendant's probation to require 180 days in jail after victim allocution under article 42.03 § 1(b) of the code of criminal procedure."

SUFFICIENCY

1. The state wants *Clewis* overruled.

***Grotti v. State*, 209 S.W.3d 747 (Tex. App.–Fort Worth 2006, pet. granted)**

In *Clewis v. State*, the Texas Court of Criminal Appeals held that the courts of appeals have jurisdiction to review the *factual* sufficiency of the evidence, and, when they do, they do not view the evidence "in the light most favorable to the verdict," but instead must set aside the verdict if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. 922 S.W. 2d 126, 134 (Tex. Crim. App. 1996).

In 2006, the court wrote at length on *Clewis*, and in a 5-4 decision, declined the state's invitation to overrule it. *Watson v. State*, 204 S.W. 3d 404 (Tex. Crim. App. 2006).

Judge Cochran dissented in *Watson*, and was joined by Judges Keller, Hervey, and Keasler.

> I respectfully dissent. For the reasons set out below, I believe that further efforts to clarify, refine, or revise the *Clewis* standard are as unlikely to succeed as our previous attempts. The *Clewis* factual-sufficiency review was a well-intentioned but ultimately unworkable effort to incorporate civil standards of review on elements of a crime that must be proven beyond a reasonable doubt. I would overrule *Clewis* and return to the single standard of review for sufficiency of the evidence in a criminal case as set out by the United States Supreme Court in *Jackson v. Virginia*. Therefore, I would reverse the court of appeals and uphold the trial court's judgment because the evidence supporting appellant's conviction was legally sufficient under the *Jackson* standard.

On April 25, 2007 the court granted discretionary review in *Grotti v. State*, 07-0134, asserting, among other things: "This case illustrates that the dissenting opinions in

Watson v. State, 204 S.W.3d 404 (Tex. Crim. App. 2006), were correct: *Clewis* should be abandoned."

UNANIMITY

1. Breasts or genitals; grammatical justice.

Pizzo v. State, ***235 S.W. 3d 711 (Tex. Crim. App. 2007)***

The indictment alleged that defendant touched the breasts and genitals of a child during the same encounter. Over appellant's objection, the jury charge authorized conviction if the jury found that he touched the breasts *or* the genitals. This was error. "We conclude that . . . the jury instruction improperly charged two separate offenses in the disjunctive and therefore permitted a conviction on less than a unanimous verdict." *Id*. at 714.

This result is proper, according to the majority, because indecency with a child by contact includes three separate offenses – touching the breasts, genitals, and anus – and is not a single offense with different methods of commission. The majority discovered this by parsing the indecency statute according to the rules of grammar, thereby breaking down the words and phrases of the indictment into subjects, verbs, direct objects, prepositional phrases, transitive verb phrases, and conjunctions.

Indecency is a conduct-oriented offense, criminalizing three separate types of conduct – touching the breasts, touching the genitals, and touching the anus. Each act constitutes a different criminal offense, and jury unanimity is required as to the commission of any one of these acts. "It is possible that six jurors convicted Pizzo for touching the breasts of A.S. while six others convicted Pizzo for touching the genitals of A.S." *Id*. at 719.

VOIR DIRE

1. Does a prosecutor's "implied bias" disqualify her from jury service in a criminal case?

***Morales v. State*, 217 S.W. 3d 731 (Tex. App.–El Paso 2007, pet. granted)**

El Paso assistant district attorney Robyn Wyatt was on the jury panel and said she could be fair and impartial despite knowing the prosecutors, the police, the judge and defense counsel. The defense lawyer argued that Wright was disqualified from jury

service because she was a party to the lawsuit, by virtue of her employment, but after the trial court overruled his challenge for cause, he failed to exercise a peremptory challenge, thereby waiving error. Both defense lawyers admitted at the motion for new trial hearing that they had been ineffective in not using a peremptory challenge on the prosecutor, but the trial court overruled the motion.

The Court of Appeals reversed. Although a majority of the Supreme Court has never recognized the doctrine of "implied bias," Justice O'Connor, in a concurring opinion, suggested it would be appropriate in "extreme situations," such as where "the juror is an actual employee of the prosecuting agency." *Smith v. Phillips*, 455 U.S. 209 (1982)(O'Connor, J., concurring). That, of course was the very situation here.

> While venireperson Wyatt may have believed she could set aside her status as an employee of the prosecuting agency, even a well-meaning person would find it difficult to remain impartial under such circumstances and most likely would be unconsciously blinded by otherwise good intentions. It is fair to say that venireperson Wyatt may believe herself to be fair and impartial, but nevertheless she should have been disqualified in the interest of justice. It is of fundamental importance that: "[J]ustice should not only be done but should manifestly and undoubtedly be seen to be done." Because venireperson Wyatt was disqualified from serving as a juror for her implied bias as a matter of law, Appellant's trial counsel rendered wholly deficient performance by failing to preserve the error of the denial of his challenge for cause. Further, we find that counsel's deficient performance resulted in a trial before a partial jury, which prejudiced the defense.

On September 12, the Texas Court of Criminal Appeals granted the state's petition for discretionary review to determine the following:

> 1. Is an assistant district attorney who has not been shown to be disqualified to serve on the jury because of actual bias, nevertheless disqualified because of "implied bias?"
>
> 2. Did the court of appeals err by not giving proper deference to the trial court's finding that defense counsel's failure to exercise a peremptory challenge against an assistant district attorney was due to sound trial strategy?

WEAPONS

1. Trading a gun for drugs is not using the gun during a drug crime.

***Watson v. United States*, 128 S. Ct. 579 (2007)**

"The question is whether a person who trades his drugs for a gun "uses" a firearm "during and in relation to ... [a] drug trafficking crime" within the meaning of 18 U.S.C. § 924(c)(1)(A).FN1 We hold that he does not."

2. The San Antonio Court is concerned about the Texas's "ever-expanding application of the deadly weapon statute.

***Spry v. State*, 2007 WL 2007 WL 3171315 (Tex. App.–San Antonio 2007, pet. filed)**

Appellant was a truck driver who crossed a median on I 10 and killed another motorist. The jury convicted him of criminally negligent homicide and made an affirmative finding that he used a deadly weapon, and the Court of Appeals affirmed the deadly weapon finding. "Although we deem the evidence sufficient to support the deadly weapon finding under the facts of this case, we express our concerns about the ever-expanding application of the deadly weapon statute in the State of Texas."

3. Does the Second Amendment prevent the District of Columbia from banning the possession of guns in the home?

***District of Columbia v. Heller*; No. 07-290**

On November 20, 2007 the United States Supreme Court granted certiorari to consider this question:

> Whether the following provisions - D.C.Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 - violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?