
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, ELIZABETH WIEHLE, MARY MARTIN,
AND PETER CHICKRIS
SUBJECT: 05/14/08 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 07/20/08
CC: JACK THOMPSON

***Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].**

KELLER, J., *delivered the opinion of a unanimous Court.*

FACTS: A jury convicted defendant of two counts of delivery of cocaine. In a prior prosecution, defendant admitted guilt to two extraneous offenses that the court took into account in sentencing. In this case, the prosecution offered evidence of those previously admitted extraneous offenses and argued that the defendant's previous admission essentially made them a prior conviction for impeachment purposes. Finding that the extraneous offenses should not have been considered prior convictions for impeachment purposes, the court of appeals reversed the conviction and remanded for a new trial. Affirming the court of appeals, the Court of Criminal Appeals held that previously admitted extraneous offense cannot be used as prior convictions for impeachment purposes.

EXTRANEOUS OFFENSE – UNADJUDICATED – BAR FUTURE PROSECUTION

The Penal Code permits a defendant (with the prosecutor's consent) to admit guilt of an unadjudicated extraneous offense, have that offense taken into account by the trial court in sentencing on the primary offense, and thereafter bar any future prosecution for that extraneous offense. ***Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].**

EVIDENCE—ERROR PRESERVATION

To preserve error, a complaining party must make a timely and specific request, objection, or motion and obtain a ruling on that request, objection, or motion. ***Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].**

EVIDENCE—ERROR PRESERVATION- RUNNING OBJECTIONS

An objection must be made each time inadmissible evidence is offered unless the complaining party obtains a running objection or a ruling on his complaint outside the presence of the jury. *Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].

EVIDENCE—PRIOR CONVICTIONS

The rules of evidence provide that, for the purpose of attacking the credibility of a witness, evidence that the witness has been *convicted* of a crime shall be admitted if: 1) elicited from the witness or established by public record, 2) the crime was a felony or involved moral turpitude, regardless of punishment, and 3) the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party. *Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].

STATUTORY INTERPRETATION—PLAIN MEANING

To interpret a statute, a court uses the plain meaning of the language unless the language is ambiguous or the plain meaning will lead to absurd results that could not have been intended by the legislature. *Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].

STATUTORY INTERPRETATION—COURT RULES

The plain meaning rule **does not apply** to interpretations of court created rules. In construing the meaning of court created rules, a court may consider extratextual sources absent ambiguity or absurd results. While courts have more flexibility to interpret court rules than statutes, they should still attempt to effectuate the plain language of the rule, absent important countervailing considerations. *Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].

INTERPRETATION OF RULES / STATUTES- GUIDELINES

In ascertaining the plain meaning of a word, we read words and phrases in context and construe them according to the rules of grammar and usage. Furthermore, a word should be construed according to any technical or particular meaning that it has acquired by legislative definition or otherwise. We initially consult dictionary definitions for the plain meaning of a word, and definitions from a legal dictionary are especially appropriate for ascertaining the meaning of a legal term. *Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].

INTERPRETATION OF RULES / STATUTES - CONVICTION

Black's Law Dictionary defines "conviction" as the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged. For there to be a conviction, there must ordinarily be a judgment of guilt for the crime in question. *Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].

DEFERRED ADJUDICATION – NOT A PRIOR CONVICTION

A trial judge's decision to defer adjudication does not constitute a conviction under the rules of evidence. Although deferred adjudication clearly involves a recognition of the defendant's guilt by a trial judge, no actual pronouncement of judgment of guilt occurs. *Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].

EVIDENCE—ADMISSION OF EXTRANEOUS OFFENSE - NOT A PRIOR CONVICTION

Admissions of extraneous offenses do not fall within the definition for final convictions; accordingly, they are not admissible as prior convictions under the Texas Rules of Evidence. *Lopez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1124-07, 05/14/08].

Safety Nat. Casualty Corp. v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

MEYERS, J., *delivered the opinion of the Court, in which KELLER, P.J., and PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, HOLCOMB, and COCHRAN, J.J., joined. COCHRAN, J., filed a concurring opinion.*

FACTS: Defendant was a surety on an accused's bond. The accused failed to appear and defendant brought him in. At the hearing, the trial judge entered a judgment *nisi* in favor of the State for one half the amount of the original bond plus court costs and took the accused into custody. Defendant argued that it was entitled to exoneration under the Code of Criminal Procedure from forfeiting the bond because the accused was placed into custody the day after his failure to appear. The trial judge entered findings of fact that the mandatory remittitur provision of the Code of Criminal Procedure was unconstitutional because it violated the court's plenary powers under the Texas Constitution. The court of appeals affirmed the trial court. Finding that Articles 22.13 and 22.16 of the Code of Criminal Procedure do not interfere with the trial court's ability to enter final judgment, nor do they dictate the time frame within which a trial court may enter a final judgment, the Court of Criminal Appeals (CCA) found that the statutes did not violate the separation-of-powers doctrine and are not unconstitutional. The CCA reversed.

CONSTITUTIONAL LAW—SEPARATION OF POWERS

The separation of powers provision of the Constitution may be violated in either of two ways: 1) when one branch of government assumes, or is delegated, *to whatever degree*, a power that is more ‘properly attached’ to another branch; and / or 2) when one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers. *Safety Nat. Casualty Corp. v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

CONSTITUTIONAL LAW—SEPARATION OF POWERS – JUDICIAL / LEGISLATIVE

The judicial branch has the power to hear evidence, decide issues of fact, decide questions of law, enter a final judgment on the facts and the law, and execute the final judgment or sentence. The legislative branch has authority over judicial administration, as long as it does not infringe upon the substantive power of the judicial branch. *Safety Nat. Casualty Corp. v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

BOND FORFEITURE—JUDGMENTS *NISI*

A judgment *nisi* alone does not authorize recovery of a bond amount by the State; it is **only a provisional judgment** that, while not final or absolute, *may* become a final judgment. That being said, a judgment *nisi* is valid unless a party can show cause that it should be withdrawn. *Safety Nat. Casualty Corp. v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

BOND FORFEITURE- FINAL JUDGMENT - ENTRY

The point of Article 22.13 (a)(5) is that, if the defendant is incarcerated when or shortly after he failed to appear, securing his return to appear is quite easy and does not require the assistance of a bondsman. Because the county would incur the cost to transfer the defendant from another jurisdiction, Article 22.13 (b) makes the surety liable for any costs incurred by the county to secure the return of the defendant. But the statute does not require a court to wait nine months before entering a final judgment, and thus, does not interfere with a court's timing or finality of judgments. *Safety Nat. Casualty Corp. v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

BOND FORFEITURE—FINAL JUDGMENT -ENTRY

Article 22.13 of the Texas Code of Criminal Procedure simply provides a surety a defense in the event that a defendant is incarcerated within nine months of his failure to appear. It does not require that the trial judge wait to enter judgment for the nine months to

lapse, nor does it dictate when the judgment is to be entered. *Safety Nat. Casualty Corp. v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

REMITTITUR-TIMING

Remittitur of a bond may occur anytime between forfeiture and the entry of a final judgment. *Safety Nat. Casualty Corp. v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

BOND FORFEITURE—EXONERATION

A surety exonerated under the Code of Criminal Procedure remains obligated to pay costs incurred by a county to secure the return of the principal. *Safety Nat. Casualty Corp. v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

BOND FORFEITURE—EXONERATION

If a defendant has been held in custody for a failure to appear and is then issued a new bond in the same case, the Code of Criminal Procedure requires the trial court to remit the amount of the original bond. *Safety Nat. Casualty Corp. v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

BOND FORFEITURE—EXONERATION

The Code of Criminal Procedure only requires bond remittitur in specific, limited situations where the return of a defendant is certain because he is incarcerated elsewhere, is secured by another bond in the same case, or the return has become unnecessary because of dismissal. *Safety Nat. Casualty Corp. v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0413-07, 05/14/08].

Williams v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1948-06, PD-1949-06, PD-1950-06, 05/14/08].

MEYERS, J., delivered the opinion of the Court, in which PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, HOLCOMB, and COCHRAN, JJ., joined. PRICE, J., filed a concurring opinion, in which HOLCOMB and KEASLER, J., joined. KELLER, P.J., dissented.

FACTS: A jury convicted defendant of three (3) counts of possession of a controlled substance with intent to deliver. The judge sentenced defendant to seventeen (17) years imprisonment and a \$3,000 fine for each conviction. The judge ordered two (2) of the sentences to be served concurrently, but ordered that the sentence for the drug-free zone offense be served consecutively to the other two (2) sentences. The court of appeals affirmed. Holding that statutory construction mandated the sentences be served concurrently, the Court of Criminal Appeals reversed.

SENTENCING—DRUG OFFENSES-TWO OPTIONS-CONFLICT

Under the Texas Controlled Substances Act, if multiple convictions arising from a single criminal episode are prosecuted together in a single action, then the sentences assessed must run concurrently. TEX. HEALTH & SAFETY CODE § 481.132(d). The statute dealing with drug free zones, however, states that punishment that is increased for a conviction for an offense listed under that statute may not run concurrently with punishment under any other criminal statute. *Williams v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1948-06, PD-1949-06, PD-1950-06, 05/14/08].

SENTENCING—DRUG OFFENSES

If a conviction falls within the “drug free” zone enhancements, the consecutive sentencing requirements will not apply if all of the convictions fall within offenses listed in the “drug free” zone statute. *Williams v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1948-06, PD-1949-06, PD-1950-06, 05/14/08].

STATUTORY CONSTRUCTION—PLAIN LANGUAGE

The courts construe statutes according to their plain language unless the language is ambiguous or the interpretation would lead to absurd results that the legislature could not have intended. *Williams v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1948-06, PD-1949-06, PD-1950-06, 05/14/08].

STATUTORY CONSTRUCTION—SPECIFIC V. GENERAL

Because statutory interpretation is a question of law, an appellate court conducts a *de novo* review. When interpreting a statute under the Code Construction Act, the courts give exclusive effect to a specific provision over a more general provision *only* when the two statutes irreconcilably conflict. *Williams v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1948-06, PD-1949-06, PD-1950-06, 05/14/08].

Busby v. State, _ S.W. 3d _ (Tex. Crim. App. 2008) [AP- 75, 300, 05/14/08].

HERVEY, J., *delivered the opinion of the Court in which* KELLER, P.J., MEYERS, JOHNSON, KEASLER, HOLCOMB *and* COCHRAN, JJ., *joined*. PRICE *and* WOMACK JJ., *concurred*.

FACTS: A jury convicted defendant of capital murder and he was sentenced to death. On direct appeal, defendant raised eleven points of error. Defendant argues that : 1) during closing jury arguments at the guilt phase, the State made three direct comments on defendant’s failure to testify; 2) the trial court erroneously overruled his motion to declare an article of the Code of Criminal Procedure unconstitutional; 3) the trial court committed a

reversible error by failing to appoint him a lawyer in a timely manner and that this failure requires suppression of all his written and oral custodial exculpatory statements; 4) after denying his pretrial motion to suppress, the trial court erred by failing to submit defendant's requested findings of fact and conclusions of law; 5) the trial court committed a reversible error by failing to submit his requested jury charge regarding the voluntariness of his custodial statements; and 6) the trial court erroneously denied seven defense challenges for cause. The Court of Criminal Appeals affirmed the trial court.

RIGHT TO SILENCE—PROSECUTORIAL COMMENT

The test for determining if prosecutorial argument is a comment on a defendant's failure to testify is whether the language used was manifestly intended or was of such character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify. It is not sufficient, however, that the language used which might impliedly or indirectly be construed as a comment on the defendant's failure to testify. *Busby v. State*, _ S.W. 3d _ (Tex. Crim. App. 2008) [AP- 75, 300, 05/14/08].

RIGHT TO SILENCE—PROSECUTORIAL COMMENT

There are no particular "trigger" words or phrases that would make a jury argument automatically improper. Rather, any objectionable argument should be evaluated on a case-by-case basis for what it would necessarily and naturally mean to a jury when taken in full context of the utterance. *Busby v. State*, _ S.W. 3d _ (Tex. Crim. App. 2008) [AP- 75, 300, 05/14/08].

RIGHT TO SILENCE—PROSECUTORIAL COMMENT

It is reasonable and proper for a prosecutor to comment on the shifting nature of the defendant's custodial statements that were admitted into evidence. When a defendant makes a statement that is admitted into evidence, the State's references to the statement and comparison between the statement and the other evidence collected is not a comment on the defendant's failure to testify or his right to remain silent. The State's closing argument may properly refer to inconsistencies between the defendant's statements to authorities. *Busby v. State*, _ S.W. 3d _ (Tex. Crim. App. 2008) [AP- 75, 300, 05/14/08].

STATEMENTS—SUPPRESSION

Suppression of the defendant's statement is not required when the defendant initiated contact with the authorities and voluntarily waived his Sixth Amendment right to counsel. *Busby v. State*, _ S.W. 3d _ (Tex. Crim. App. 2008) [AP- 75, 300, 05/14/08].

CONFESSION – VOLUNTARINESS-FINDINGS OF FACT

A trial court complies with the statutory requirements to file findings and conclusions on issue of voluntariness of a defendant's confession when it dictates its findings and conclusions to the court reporter, the findings are transcribed, made a part of the statement of facts, filed with the district clerk, and made a part of the appellate record. ***Busby v. State*, _ S.W. 3d _ (Tex. Crim. App. 2008) [AP- 75, 300, 05/14/08].**

JURY INSTRUCTION-DEFENDANT’S STATEMENT-VOLUNTARINESS

A defendant is entitled to Article 38.23(a) jury instruction regarding the voluntariness of his custodial statements **only** when the evidence raises an “affirmatively contested” fact issue that is material to the lawfulness of the challenged conduct in obtaining the evidence. ***Busby v. State*, _ S.W. 3d _ (Tex. Crim. App. 2008) [AP- 75, 300, 05/14/08].**

CHALLENGE FOR CAUSE

Harm from an erroneous denial of a defense challenge for cause occurs when: 1) the defendant uses a peremptory strike to remove a veniremember who the trial court should have excused for cause at the defendant’s request; 2) the defendant uses all of his statutorily allotted peremptory strikes; and 3) the defendant unsuccessfully requests an additional peremptory strike which he claims he would have used to remove another veniremember whom the defendant identifies as “objectionable” and who actually sits on the jury. ***Busby v. State*, _ S.W. 3d _ (Tex. Crim. App. 2008) [AP- 75, 300, 05/14/08].**

***Lancon v. State*, _S.W.3d _ (Tex. Crim. App. 2008) [No. 0182-07, 05/14/08].**

MEYERS, J., *delivered the opinion of the Court, in which* KELLER, P.J., KEASLER, HERVEY, and COCHRAN, JJ., *joined*. JOHNSON, J., *filed a dissenting opinion, in which* PRICE and HOLCOMB, JJ., *joined*. WOMACK, J., *dissented*.

FACTS: Convicting the defendant of one count of murder, attempted murder, and deadly conduct, a jury sentenced him to twenty-five years’, fifteen years’, and ten years’ imprisonment, respectively. On appeal, defendant argued that: 1) the evidence was insufficient to sustain his convictions; 2) the prosecutor failed to disclose exculpatory evidence; and 3) the trial court improperly admitted two photographs evidence. The court of appeals held: 1) it was not an abuse of discretion to admit the two photographs into evidence, 2) defendant failed to establish that it was reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure of the alleged exculpatory evidence, and 3) that the evidence was factually insufficient to support the

defendant's convictions. The court of appeals reversed and remanded for a new trial. On the State's petition for discretionary review, the Court of Criminal Appeals (CCA) found that, by substituting its judgment regarding the credibility of the witness' testimony, the appellate court did not correctly apply the factual sufficiency standard of review. The CCA vacated the appellate court's judgment and remanded the case for reconsideration.

FACTUAL CONCLUSIVITY CLAUSE

The Factual Conclusivity Clause of the Texas Constitution states that courts of appeals shall be conclusive on all questions of fact brought before them on appeal or error. TEX. CONST. art. V, §6. This statute indicates that the Court of Criminal Appeals is not permitted to conduct a *de novo* review of a court of appeals' factual sufficiency determination. The question of whether the court of appeals applied the correct rule of law, however, is a legal question and is subject to review. *Lancon v. State*, S.W.3d (Tex. Crim. App. 2008) [No. 0182-07, 05/14/08].

EVIDENCE-FACTUAL SUFFICIENCY- STANDARD OF REVIEW

In deciding whether a court of appeals applied the correct standard of review when it reversed a trial court judgment for factual insufficiency, an appellate court must examine whether the court of appeals carried out the judicially-imposed requirements for safeguarding a defendant's right to trial by jury, which includes deference to the jury's verdict and examination of all of the evidence. *Lancon v. State*, S.W.3d (Tex. Crim. App. 2008) [No. 0182-07, 05/14/08].

EVIDENCE – FACTUAL SUFFICIENCY- STANDARD OF REVIEW

There are three ground rules that guide an appellate court in conducting a factual-sufficiency analysis: 1) the court of appeals must recognize that a jury has passed judgment on the facts and give due deference to the jury determinations, and even if the court disagrees, it must avoid substituting its judgment for that of the jury; 2) the appellate opinion should clearly lay out and explain how the evidence supporting the verdict is too weak on its own, or state how the contradicting evidence greatly outweighs evidence in support of the verdict; and 3) the court of appeals should review all the evidence in a neutral light, as opposed to a legal-sufficient review in which the evidence is viewed in the light most favorable to the verdict. *Lancon v. State*, S.W.3d (Tex. Crim. App. 2008) [No. 0182-07, 05/14/08].

EVIDENCE – FACTUAL INSUFFICIENCY-WRONG / UNJUST VERDICT

An appellate court should set aside a jury verdict only if the evidence supporting the verdict is insufficient to the extent that it renders the verdict clearly wrong or manifestly unjust. *Lancon v. State*, S.W.3d _ (Tex. Crim. App. 2008) [No. 0182-07, 05/14/08].

EVIDENCE- INSUFFICIENT- LEGALLY / FACTUALLY

Evidence can be insufficient in two ways: 1) it may be legally sufficient, but too weak to support the verdict; or 2) when considering the conflicting evidence, the jury's verdict is against the great weight and preponderance of the evidence. *Lancon v. State*, S.W.3d _ (Tex. Crim. App. 2008) [No. 0182-07, 05/14/08].

EVIDENCE- CONFLICTING-EVALUATION OF CREDIBILITY - JURY

The jury is the sole judge of what weight to give contradictory witness testimony. Accordingly, appellate courts should afford complete deference to a jury's decision when that decision is based upon an evaluation of credibility. The jury is in the best position to judge the credibility and demeanor of a witness because it is present to hear the testimony, as opposed to an appellate court who relies on the cold record. *Lancon v. State*, S.W.3d _ (Tex. Crim. App. 2008) [No. 0182-07, 05/14/08].

JURY VERDICT- REVIEW

Since the jury is the sole judge of a witness's credibility, and the weight to be given the testimony, the jury may choose to believe some testimony and disbelieve other testimony. Therefore, a decision is not manifestly unjust solely because the reviewing court would have resolved the conflicting evidence in a different way. *Lancon v. State*, S.W.3d _ (Tex. Crim. App. 2008) [No. 0182-07, 05/14/08].

State v. Morales, S.W.3d _ (Tex. Crim. App. 2008) [PD-0462-07, 05/14/08].

PRICE, J., *delivered the opinion of the Court in which* KELLER, P.J., *and* MEYERS, JOHNSON, KEASLER, HERVEY, HOLCOMB *and* COCHRAN, JJ., *joined*. WOMACK, J., *flied a concurring opinion*.

FACTS: After finding the defendant guilty of aggravated sexual assault of a child and indecency with a child, a jury sentenced him to thirty years' imprisonment and twenty years' imprisonment, respectively. On appeal, defendant argued that: 1) the trial court erred in refusing to grant a challenge for cause against a prospective juror who, as an assistant district attorney, was biased as a matter of law; and 2) trial counsel for the defendant was ineffective because they failed to preserve the challenge for cause for appeal. Finding the juror biased as a matter of law and the defendant's trial counsel ineffective, the court of

appeals reversed and remanded for a new trial. On State's petition for discretionary review, the CCA held that: 1) the trial court was not required to excuse for cause prospective juror who was assistant district attorney in same office that was prosecuting defendant, and 2) counsel's decision not to preserve for review denial of challenge for cause by exercising peremptive strike against prospective juror was matter of reasonable, if difficult, trial strategy that did not support claim of ineffective assistance of counsel. The CCA reversed and remanded to the court of appeal.

CHALLENGE FOR CAUSE – ASSISTANT DISTRICT ATTORNEY

The Code of Criminal Procedure permits challenges for cause to the parties in a criminal prosecution under certain, specified circumstances. The Code also recognizes some categories of presumed or implied bias as a basis for a challenge for cause. For example, the defendant may challenge a prospective juror for cause who is related within the third degree of consanguinity or affinity to any prosecutor in the case. But, this article does not expressly require a trial court to grant a challenge for cause against a prospective juror merely because she is an assistant district attorney and has no personal involvement in the defendant's prosecution. As a statutory matter, therefore, it is not an abuse of discretion for a trial judge to deny such a challenge because the right to an impartial jury is to be exercised at the option of the defendant. *State v. Morales*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-0462-07, 05/14/08].

CHALLENGE FOR CAUSE – SIXTH AMENDMENT--IMPARTIAL JURY

The Sixth Amendment guarantees the defendant a right to an impartial jury. A state court must grant a challenge for cause if the failure to do so will result in a biased jury. If the Sixth Amendment dictates that the service of a prospective juror in a criminal case who is an assistant district attorney in the same office as the prosecutor in the case would necessarily cause the jury to be biased, then a challenge for cause on that bias should be granted regardless of whether state law requires it or not. *State v. Morales*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-0462-07, 05/14/08].

SIXTH AMENDMENT--IMPARTIAL JURY-WAIVER

In the interest of an overall trial strategy, a defendant may waive his Sixth Amendment right to an impartial jury. *State v. Morales*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-0462-07, 05/14/08].

RIGHT TO COUNSEL—INEFFECTIVE ASSISTANCE

To prevail on a claim of ineffective counsel, the defendant must establish that: 1) his trial counsel's performance was constitutionally deficient and 2) the deficiency operated to prejudice him. *State v. Morales*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-0462-07, 05/14/08].

RIGHT TO COUNSEL—INEFFECTIVE ASSISTANCE

When the record is not sufficient to demonstrate that the defendant's trial counsel's conduct was the product of a strategic or tactical decision, a reviewing court should presume that the trial counsel's performance was constitutionally adequate, unless the challenged conduct was so outrageous that no competent attorney would have engaged in it. *State v. Morales*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-0462-07, 05/14/08].

JUROR BIAS – REVERSIBLE ERROR

When a constitutional claim of juror partiality is properly preserved for appeal and borne out by the appellate record, the service of even a single partial juror will vitiate a conviction. *State v. Morales*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-0462-07, 05/14/08].

RIGHT TO COUNSEL—INEFFECTIVE ASSISTANCE

Since it is permissible for trial counsel to retain a juror who is actually biased for strategic or tactical reasons, then *a fortiori*, trial counsel must be permitted to make strategic or tactical decision to retain a juror who is only presumably biased by virtue of her status as an assistant district attorney. Therefore, a defendant's Sixth Amendment right to effective assistance of counsel would be not violated if the defendant's trial counsel chose to use a scare peremptory challenge for the purpose of securing a perceived advantage, rather than to preserve such an error for appeal. *State v. Morales*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-0462-07, 05/14/08].