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MEMORANDUM

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**TO:** JUDGES TRYING CRIMINAL CASES

**FROM:** DEBORAH SELDEN AND INTERNS ROBERT OWEN, DIMITRIOS GAKIDIS, JENNY BRZOWSKI, AND ZACHARY LEE

**SUBJECT:** 03/21/07 COURT OF CRIMINAL APPEALS OPINIONS

**DATE:** 03/30/07

**CC:** JACK THOMPSON

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***Euler v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0472-05, 03/21/07].**

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

**FACTS:** Upon determining that defendant committed new crimes, the trial court revoked defendant's probation. Defendant appealed. The court of appeals affirmed. On PDR, the Court of Criminal Appeals affirmed, holding that revoking probation and assessing punishment without separate hearing on separate day to determine punishment did not violate due process.

**DUE PROCESS**

The touchstone of due process is fundamental fairness. ***Euler v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0472-05, 03/21/07].**

**DUE PROCESS – PROBATION PROCEEDINGS**

No state may deprive any person of the conditional liberty created by probation unless the state employs procedures that are fundamentally fair and comply with due process. ***Euler v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0472-05, 03/21/07].**

**DUE PROCESS – PROBATION PROCEEDINGS – VIOLATION**

If the factfinder finds a violation of the conditions of probation, it has discretion to continue the probation. In such a situation, the probationer is entitled by due process to an opportunity to show not only that he did not violate the conditions of probation, but also that there was a justifiable excuse for any violation or that revocation is not the

appropriate disposition of his case. *Euler v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0472-05, 03/21/07].

**DUE PROCESS – REVOCATION – NO SEPARATE PUNISHMENT HEARING**

While due process does not require a separate hearing on punishment, fairness dictates that a defendant be accorded an opportunity to offer appropriate evidence in mitigation of punishment after the revocation of probation and the adjudication of guilt. This opportunity should be before the assessment of punishment if such evidence has not already been elicited during the proceedings, particularly if the defendant requests the opportunity. *Euler v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0472-05, 03/21/07].

*Ex Parte Masonheimer*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-521-05, 03/21/07].

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

**FACTS:** After two trials for murder ended in mistrials, defendant applied for writ of habeas corpus, contending that retrial was barred by double jeopardy because of the prosecution's reckless conduct in withholding *Brady* material. The trial court granted writ. The State appealed. The court of appeals reversed and remanded for new trial. The State and defendant filed cross-petitions for discretionary review. The Court of Criminal Appeals reversed the court of appeals and affirmed the trial court judgment, holding that: (1) consideration of the *mens rea* of the lead prosecutor in the first trial was necessary in determining whether the State acted intentionally, and (2) double jeopardy barred third trial.

**DOUBLE JEOPARDY – PROSECUTORIAL CONDUCT – MENS REA**

Consideration of the *mens rea* of the entire prosecutorial team, including that of the lead prosecutor in the first trial, is necessary to determine whether the State acted intentionally and whether double jeopardy should bar retrial after a second mistrial requested by defendant. *Ex Parte Masonheimer*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-521-05, 03/21/07].

### **DOUBLE JEOPARDY – PROSECUTORIAL CONDUCT – MISTRIAL**

The *Oregon v. Kennedy* standard means that a retrial after a defense-requested mistrial is jeopardy barred only when the prosecutorial conduct giving rise to the successful motion for a mistrial was intended to provoke or goad the defendant into moving for mistrial. *Ex Parte Masonheimer*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-521-05, 03/21/07].

### **DOUBLE JEOPARDY – PROSECUTORIAL CONDUCT – INTENT**

Double jeopardy does not bar retrial after defense-requested mistrial unless State intentionally commits misconduct with the specific intent of forcing defendant to move or consent to mistrial or with the specific intent of prejudicing defendant's prospects for an acquittal if trial continued to verdict. *Ex Parte Masonheimer*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-521-05, 03/21/07].

### **DOUBLE JEOPARDY – PROSECUTORIAL MISCONDUCT – BRADY EVIDENCE**

Double jeopardy bars a third trial of defendant whose mistrial motions were necessitated primarily by State's intentional failure to disclose exculpatory *Brady* evidence with the specific intent to avoid the possibility of an acquittal. *Ex Parte Masonheimer*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-521-05, 03/21/07].

### **PROSECUTORIAL MISCONDUCT – DOUBLE JEOPARDY**

In a case where the State intentionally fails to disclose exculpatory evidence that was available before trial with the specific intent to avoid the possibility of an acquittal, the defendant suffers the same harm as when the State intentionally goads or provokes the defendant into moving for a mistrial. *Ex Parte Masonheimer*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-521-05, 03/21/07].

*Valdez v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0500-06, 03/21/07].

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

**FACTS:** Defendant was convicted of two robberies. The jury assessed enhanced 30-year sentences for these robbery convictions after unanimously finding that defendant had been finally convicted of at least one felony offense on two separate occasions from a list of three offenses. On appeal, defendant claimed the jury's enhancement findings violated his right to a unanimous jury verdict. He argued that because the jury only had to agree

that he had been convicted of two felonies, rather than agreeing on which two felonies, he was denied a unanimous jury verdict. The court of appeals rejected defendant's argument and affirmed the judgment of the trial court. On PDR, the Court of Criminal Appeals affirmed the ruling of the court of appeals.

#### **JURY UNANIMITY**

The question of what the jury must decide unanimously in cases is determined by the legislative intent of the applicable statute. *Valdez v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0500-06, 03/21/07].

#### **JURY UNANIMITY – ENHANCEMENT**

Section 12.42(d) of the Texas Penal Code provides for enhanced punishment if the defendant has previously been convicted of two felony offenses. The jury must unanimously agree that defendant has been convicted of two felony offenses before it may enhance a defendant's sentence under the Penal Code. When a combination of more than two felonies is charged for enhancement purposes, jury unanimity is not required on any two specific felonies out of the combination. The jury must only agree that two felonies were committed. *Valdez v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0500-06, 03/21/07].

*Sierra v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-453-05, 03/21/07].

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

**FACTS:** Defendant, a Mexican national, was convicted of capital murder. The State waived the death penalty, and defendant was sentenced to an automatic life sentence. After being arrested and receiving his *Miranda* warnings, defendant gave a written confession. Police knew defendant was a Mexican national, but never contacted the Mexican consulate and did not inform defendant of his right under Article 36 of the Vienna Convention to contact the consulate. Defendant filed a motion to suppress arguing that police violated his rights under the Vienna Convention. The trial court denied the motion, the confession was introduced at trial, and defendant was subsequently convicted. The court of appeals affirmed the trial court's judgment. On PDR, the Court of Criminal Appeals affirmed the ruling of the court of appeals.

### **VIENNA CONVENTION – ARTICLE 36**

Article 36 of the Vienna Convention governs relations between consulates and their nationals. It grants a foreign national who has been arrested, imprisoned, or taken into custody a right to contact his consulate and requires the arresting government authorities to inform the individual of the right “without delay.” *Sierra v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-453-05, 03/21/07].

### **VIENNA CONVENTION – NO PRIVATELY ENFORCEABLE FEDERAL RIGHTS**

The U.S. Supreme Court has held that violation of Article 36 of the Vienna Convention does not entitle a defendant to suppression of statements given to police under the federal exclusionary rule. *Sierra v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-453-05, 03/21/07].

### **VIENNA CONVENTION – NO PRIVATELY ENFORCEABLE STATE RIGHTS**

The Court of Criminal Appeals has held that treaties, like the Vienna Convention, do not qualify as “law” under the state exclusionary rule; therefore violation of international treaties does not entitle a defendant to suppress statements given to police under the state exclusionary rule. *Sierra v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-453-05, 03/21/07].

### **VIENNA CONVENTION – OTHER REMEDIES**

The U.S. Supreme Court has stated that diplomatic avenues are the primary means of enforcing the Vienna Convention. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police. If a defendant raises an Article 36 violation at trial, a court can make the appropriate accommodations to ensure the defendant secures, to the extent possible, the benefits of consular assistance. *Sierra v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-453-05, 03/21/07].