

---

---

**MEMORANDUM**

---

---

**TO:** JUDGES TRYING CRIMINAL CASES  
**FROM:** DEBORAH SELDEN AND INTERNS ROBERT OWEN, DIMITRIOS GAKIDIS, JENNY BRZOWSKI, ZACHARY LEE  
**SUBJECT:** 04/18/07 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 05/02/07  
**CC:** JACK THOMPSON

---

***Flowers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1081-06].**

COCHRAN, J., *delivered the opinion of a unanimous Court in which* KELLER, P.J., WOMACK, KEASLER, HERVEY, *and* HOLCOMB, J.J., *joined*. JOHNSON, J., *filed a concurring opinion, in which* PRICE, J., *joined*. MEYERS, J., *not participating*.

**FACTS:** Defendant was convicted of driving while intoxicated. To prove its enhancement allegations, the State offered certified copies of: (1) defendant's Texas driver's license record and (2) a Dallas County computer generated printout of defendant's conviction record during the punishment phase of trial. Both documents were offered to establish that defendant had a prior conviction for driving while intoxicated. The trial judge found the enhancements true. The court of appeals affirmed holding that the evidence was legally and factually sufficient to prove the enhancement paragraph. The Court of Criminal Appeals granted PDR to review whether the court of appeals erred in holding a computer printout to be the functional equivalent of a judgment and sentence constituting sufficient proof beyond a reasonable doubt of a valid final conviction. The Court of Criminal Appeals affirmed the judgment of the court of appeals.

**PRIOR CONVICTION – ESTABLISHING A PRIOR CONVICTION**

To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction. ***Flowers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1081-06].**

**PRIOR CONVICTION – PROOF OF CONVICTION**

The State may prove the elements of a prior conviction in a number of ways, including (1) the defendant's admission or stipulation, (2) testimony by a person who was present when the person was convicted of a specified crime and can identify the defendant as

that person, or (3) documentary proof (such as a judgment) that contains sufficient information to establish both the existence of a prior conviction and the defendant's identity as the person convicted. *Flowers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1081-06].

#### **PRIOR CONVICTION – NO BEST EVIDENCE RULE**

There is no best evidence rule in Texas that requires that the fact of a prior conviction be proven with any specific document. *Flowers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1081-06].

#### **PRIOR CONVICTION – STANDARD OF PROOF**

The trier of fact must find the elements of defendant's prior conviction beyond a reasonable doubt. *Flowers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1081-06].

#### **PRIOR CONVICTION – EVIDENCE – DRIVING RECORD ONLY**

Introduction of defendant's driving record only is insufficient to prove the elements of a prior conviction for driving while intoxicated, because a driving record only proves that the Texas Department of Public Safety has received a listed notice of conviction. All information in a driving record comes from a secondhand source, not the convicting court. *Flowers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1081-06].

#### **PRIOR CONVICTION – EVIDENCE – DRIVING RECORD ONLY**

Rule 902 of the Texas Rules of evidence explicitly allows for the self-authentication of certified copies of public records, including data compilations in any form certified as correct by their custodian. A computer-generated compilation of information setting out the specifics of a criminal conviction that is certified as correct by the county of district clerk of the court in which the conviction was obtained is admissible under Rule 902. *Flowers v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1081-06].

*Ex Parte Cruzata*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,513, 04/18/07].

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

**FACTS:** A grand jury returned an indictment charging defendant with indecency with a child. Pursuant to a plea bargain, defendant pled guilty to the offense charged and the trial court placed him on deferred-adjudication community supervision. About a year later, the State

filed a motion to proceed with an adjudication of defendant's guilt, alleging that he had violated the conditions of his community supervision. The trial court held a hearing and defendant entered an open plea of true to the State's allegations. The trial court accepted defendant's plea, found that he had violated the conditions of his community supervision, adjudicated his guilt of the primary offense, and assessed his punishment at imprisonment for seven years. A few minutes later, after being reminded by the State that defendant had "a very extensive history of extraneous offenses," the trial court announced that it was going to withdraw its assessment of punishment and reset the hearing for sentencing at a later date. Defendant objected to the trial court's withdrawal of its assessment of punishment, but the trial court overruled his objection. The trial court held another hearing in this case; after hearing argument, it reassessed defendant's punishment at imprisonment for fifteen years.

Defendant asked the trial court for permission to appeal from the reassessment of punishment, apparently in the belief that such permission was required. The trial court responded by stating that no such permission was required, but defendant filed no appeal. Defendant filed an application for writ of habeas corpus in the trial court, arguing *inter alia* that his fifteen-year sentence was improper. The trial court recommended that the Court of Criminal Appeals deny habeas relief. The Court of Criminal Appeals denied relief.

#### **HABEAS CORPUS – APPEAL REQUIREMENT**

As an extraordinary remedy, habeas corpus is available only when no other adequate remedy exists at law. Consequently, habeas corpus may not be used to assert claims that could have been asserted on direct appeal. *Ex Parte Cruzata*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-75,513, 04/18/07].

#### **TIMING – MODIFICATION OF SENTENCE**

A trial court may revise, correct, or vacate a sentence before the defendant begins to serve that sentence. A trial court may modify a sentence if: 1) the modification is made on the same day as the assessment of that sentence **and** before court adjourns for the day, or 2) on a later day **if** defendant has not begun serving his sentence. *Ex Parte Cruzata*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-75,513, 04/18/07].

***Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].**

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

**FACTS:** Defendant was convicted of capital murder. Pursuant to the jury's answers to the special issues, the trial judge sentenced defendant to death. Direct appeal to the Court of Criminal Appeals is automatic. The Court of Criminal Appeals found all sixteen of defendant's points of error to be without merit and affirmed the judgment.

#### **FACTUAL SUFFICIENCY REVIEW – REQUIREMENTS FOR REVERSAL**

In a factual sufficiency review, the evidence is reviewed in a neutral light rather than (as in a legal sufficiency review) in the light most favorable to the verdict. Evidence can be factually insufficient in one of two ways: (1) when the evidence supporting the verdict is so weak that the verdict seems clearly wrong and manifestly unjust, and (2) when the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust. ***Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].**

#### **FACTUAL SUFFICIENCY – STANDARD OF REVIEW**

A reversal for factual insufficiency cannot occur when the greater weight and preponderance of the evidence actually favors conviction. Although an appellate court reviewing factual sufficiency has the ability to second-guess the jury to a limited degree, the review should still be deferential, with a high level of skepticism about the jury's verdict required before a reversal can occur. ***Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].**

#### **EXPERT TESTIMONY – CONCLUSIONS – LAY/SPECIALIZED KNOWLEDGE**

The courts should be cautious about permitting experts to draw conclusions that rest on both expert and lay knowledge. Once the expert has imparted his specialized knowledge to the jury, the jury can use that knowledge, along with its own lay knowledge of human nature, to arrive at its own conclusion. ***Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].**

#### **WITNESS TESTIMONY – DISCLOSURE – ORAL STATEMENTS**

After a witness testifies, Rule 615 permits the opposing party to compel disclosure of, among other things, a substantially verbatim recital of an oral statement made by the witness

that is recorded contemporaneously. At the time the oral statement is made, it must be preserved by means of a transcription or recording – whether it be by stenographic, mechanical, electrical, or other means. *Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].

#### **STRUCTURAL ERROR – CONSTITUTIONAL RIGHT TO COUNSEL**

To qualify as "structural," an error involving the constitutional right to counsel must amount to a complete denial of counsel. *Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].

#### **SCIENTIFIC EVIDENCE – DAUBERT/KELLY**

*Kelly* requires that the proponent of scientific evidence show (1) the underlying scientific theory is valid, (2) the technique applying the theory is valid, and (3) the technique was properly applied on the occasion in question. *Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].

#### **SCIENTIFIC EVIDENCE – PREDICATE – RELIABILITY**

Scientific evidence should not be admitted on the basis of a record devoid of the proper showing of reliability. *Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].

#### **VICTIM IMPACT EVIDENCE**

"Victim impact" evidence is evidence of the effect of an offense on people *other* than the victim. *Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].

#### **EVIDENCE – VICTIM IMPACT – LIMITATIONS**

The State can, within limits, introduce victim impact evidence of which the defendant was not aware. The articulated limitations to the admission of victim impact evidence do not apply when the defendant was *aware* of the impact at the time of the crime; then the evidence would necessarily be relevant to considerations regarding defendant's future dangerousness and moral culpability. *Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].

#### **EVIDENCE – PRESERVATION OF ERROR – EXECUTION-IMPACT TESTIMONY**

To preserve error regarding the exclusion of evidence, the offering party must make an offer of proof conveying the substance of the proffered evidence. A trial court does not

abuse its discretion in excluding "execution-impact" testimony. ***Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].**

#### **MOTIONS IN LIMINE –PRESERVATION OF ERROR**

Motions *in limine* do not preserve error if defendant fails to lodge a proper objection. ***Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].**

#### **INEFFECTIVE COUNSEL CLAIMS –REBUTTAL**

Before granting relief on an ineffective assistance claim, the Court of Criminal Appeals requires that counsel be afforded the opportunity to outline the reasons for the omission. To warrant reversal without affording counsel such an opportunity, the challenged conduct must be "so outrageous that no competent attorney would have engaged in it."

***Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].**

#### **DEATH PENALTY –EQUAL PROTECTION**

A disparity in death-penalty decision-making from county to county in Texas does not violate the Equal Protection Clause. ***Roberts v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,051, 04/18/07].**