

---

---

MEMORANDUM

---

---

**TO:** JUDGES TRYING CRIMINAL CASES  
**FROM:** DEBORAH SELDEN AND INTERNS DIMITRIOS GAKIDIS AND MARY MARTIN  
**SUBJECT:** 09/26/07 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 10/22/07  
**CC:** JACK THOMPSON

---

***Harrison v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1226-05, 09/26/07].**

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

**FACTS:** A jury convicted defendant of manslaughter and injury to a child and assessed punishment at 15 years and 20 years confinement. Defendant appealed his conviction, arguing that the trial court erred by allowing the State to ask a defense witness "were you aware" questions about defendant's prior assault convictions. The court of appeals reversed the judgment and remanded the case to the trial court, holding that the witness's volunteered and nonresponsive opinion testimony that defendant was a "good" and "sweet" person did not open the door to character evidence. On the State's PDR, the Court of Criminal Appeals reversed the court of appeals. The CCA held that if the defendant offers evidence of his good character, the prosecution can introduce its own character evidence to rebut the implications of the defendant's character evidence.

**EVIDENCE - CHARACTER / REPUTATION – OPENING THE DOOR**

In a criminal case, the general rule is that evidence of a person's character is not admissible to prove conforming conduct; however, a defendant may bring his character into issue by introducing character or reputation evidence. ***Harrison v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1226-05, 09/26/07].**

**EVIDENCE - CHARACTER / REPUTATION – REBUTTAL**

Once the defendant has introduced character or reputation evidence, the State may offer rebuttal character evidence. ***Harrison v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1226-05, 09/26/07].**

### **EVIDENCE - CHARACTER / REPUTATION – TESTIMONY**

Character evidence may be introduced by testimony as to reputation or by testimony in the form of an opinion. *Harrison v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1226-05, 09/26/07].

### **EVIDENCE - CHARACTER / REPUTATION EVIDENCE – TESTIMONY – REBUTTAL**

Rebuttal character evidence may be elicited in the form of "have you heard" or "were you aware" questions about specific instances of conduct inconsistent with the character trait the defendant has brought into issue. *Harrison v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1226-05, 09/26/07].

### **EVIDENCE - CHARACTER / REPUTATION – CROSS-EXAMINATION**

The purpose of permitting cross-examination of a character witness for the defense is not to discredit the defendant whose character is at issue, but rather to discredit the testimony of the character witness. *Harrison v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1226-05, 09/26/07].

*Scott v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1603-05, 1604-05, 1605-05, 09/26/07].

KEASLER, J., *delivered the opinion of the unanimous Court.*

**FACTS:** A jury convicted defendant on three counts of inducing sexual performance by a child, and three counts of producing or promoting sexual performance by a child. The jury also convicted him on his plea of guilty to three counts of possessing child pornography. The court of appeals reversed and acquitted defendant as to his convictions on Count One; reversed and remanded the convictions on Count Two, and reversed and remanded for a new trial on Count Three. On the State's PDR, the Court of Criminal Appeals affirmed in part and reversed in part the court of appeals' decision. Dismissing the State's first ground for review as improvidently granted, the Court left the court of appeal's judgment reversing Count One undisturbed. The CCA further held that the trial court's refusal to grant defendant mandatory severance of the possession of child pornography counts from the counts charging defendant with producing or promoting a sexual performance by a child was harmless error because it did not affect defendant's substantial rights.

### **SEVERANCE OF COUNTS – HARMLESS ERROR**

A trial court's failure to grant a mandatory severance is subject to a harm analysis. An error is harmless if it does not adversely affect the defendant's substantial rights. *Scott v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1603-05, 1604-05, 1605-05, 09/26/07].

### **EVIDENCE - SEVERANCE OF COUNTS – HARMLESS ERROR**

To judge the likelihood that harm occurred from a trial court's failure to grant mandatory severance, an appellate court must consider everything in the record including all the evidence admitted at trial, the closing arguments, and the jurors' comments during voir dire. *Scott v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1603-05, 1604-05, 1605-05, 09/26/07].

### **SEVERANCE OF COUNTS – EVIDENCE – HARMLESS ERROR**

Whenever two or more offenses have been consolidated or joined for trial, the defendant shall have a right to a severance of the offenses, except to certain offenses involving children. *Scott v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1603-05, 1604-05, 1605-05, 09/26/07].

### **EVIDENCE – HARMLESS ERROR**

Where the error involved defies analysis by harmless error standards or the data is insufficient to conduct a meaningful harmless error analysis, then the error will not be proved harmless beyond a reasonable doubt. However, if the data necessary to conduct a harm analysis is missing, an appellate court must still conduct a harm analysis and simply take the absence of data into consideration. *Scott v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1603-05, 1604-05, 1605-05, 09/26/07].

### **SEVERANCE - RATIONALE**

The rule allowing severance rests upon two legitimate concerns: (1) that the jury may convict a 'bad man' who deserves to be punished-not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged. *Scott v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1603-05, 1604-05, 1605-05, 09/26/07].

*In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

PRICE, J., *delivered the opinion of the unanimous Court.*

**FACTS:** A defendant charged with felony driving while intoxicated (DWI), filed a motion to disqualify the county attorney because the attorney had previously represented defendant on a prior DWI charge. The trial court denied his motion and the defendant filed an application for a writ of mandamus with the court of appeals. After the court of appeals granted defendant's mandamus relief, the county attorney filed a petition for a writ of mandamus with the Court of Criminal Appeals. After finding that the court of appeals abused its discretion when it ordered the trial court to disqualify county attorney, the CCA conditionally granted the county attorney's writ.

## **PROSECUTOR / DEFENDANT - PRIOR ATTORNEY / CLIENT RELATIONSHIP**

A trial court only has authority to order a prosecutor to disqualify himself based upon a conflict of interest so substantial as to rise to the level of a due process violation. A defendant's due process rights are violated when an attorney represents a client and then participates in the prosecution of that client in the same matter or in another matter that has a substantial relationship to the initial matter. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

## **JURISDICTION – MANDAMUS -DECISIONS OF INTERMEDIATE COURTS**

The Court of Criminal Appeals lacks jurisdiction to consider the decisions of the courts of appeals in the exercise of their original jurisdiction, at least under its appellate authority via petitions for discretionary review. However, the CCA can exercise its own original jurisdiction in a separate mandamus proceeding to determine whether an intermediate court of appeals has clearly abused its discretion in granting mandamus relief. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

## **MANDAMUS RELIEF – STANDARD OF PROOF**

The traditional test for determining whether mandamus relief is appropriate requires the relator to establish two things: 1) he must show that he has no adequate remedy at law to redress his alleged harm; and 2) he must show that what he seeks to compel is a ministerial act that does not involve a discretionary or judicial decision. If the relator fails to satisfy either aspect of the two-part mandamus test, then relief should be denied. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

## **MANDAMUS RELIEF – CLEAR RIGHT TO RELIEF REQUIRED**

In regards to the second requirement of the test on mandamus relief, it is satisfied if the relator can show he has “a clear right to the relief sought.” That is, “when the facts and circumstances dictate but one rational decision” under unequivocal, well-settled (i.e., from extant statutory, constitutional, or case law sources), and clearly controlling legal principles. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

## **MANDAMUS - MINISTERIAL DUTY TO RULE**

While a trial court has a ministerial duty to rule upon a motion that is properly and timely presented to it for a ruling, in general it has no ministerial duty to rule a certain way on that motion. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

#### **MANDAMUS – UNAVAILABLE ON DISCRETIONARY ISSUES**

Mandamus will not lie to compel the trial court to rule a certain way on an uncertain and unsettled issue the resolution of which involves a fair amount of discretion. In short, mandamus is improper to order a trial court to exercise its judicial (as opposed to its ministerial) function in a particular way unless the relator has a “clear right to the relief sought.” The law the relator invokes must be definite, unambiguous, and unquestionably applies to the indisputable facts of the case. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

#### **MANDAMUS RELIEF – STANDARD OF PROOF**

When a relator asks the Court of Criminal Appeals to issue a writ of mandamus to order a lower appellate court to rescind a mandamus order of its own, the Court of Criminal Appeals measures the lower appellate court's exercise of its own mandamus authority under a “clear abuse of discretion” standard. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

#### **MANDAMUS RELIEF – REVIEW**

The Court of Criminal Appeals gives no particular deference to a court of appeals’ judgment with respect to whether a relator has established the requisites for mandamus relief. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

#### **MANDAMUS RELIEF – REVIEW – DE NOVO**

A court of appeals clearly abuses its discretion when it grants a writ of mandamus absent a proper basis. The Court of Criminal Appeals determines whether the court of appeals abused its discretion by essentially undertaking a *de novo* application of the two pronged test applied by the court of appeals. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

#### **DISQUALIFICATION – ELECTED DISTRICT ATTORNEY- TRIAL COURT AUTHORITY**

A trial court is without legal authority to disqualify an elected district attorney on the basis of a violation of the disciplinary rules alone. *In Re State Ex Rel. Young*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,648, 09/26/07].

*Bennett v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1350-06, 09/26/07].

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

**FACTS:** A jury convicted defendant of assault and assessed punishment at 45 days confinement and a \$1,000 fine, probated. The court of appeals reversed and remanded for further proceedings. On the

State's petition for discretionary review, the Court of Criminal Appeals reversed the judgment of the court of appeals and affirmed the trial court's judgment. The CCA held that defendant's request for instruction on self-defense was insufficient to preserve for appellate review claim that she was entitled to instruction on defense of third person.

#### **INSTRUCTIONS – SPECIAL ISSUES AND DEFENSES**

Self-defense and defense of a third person are separate defenses, and a request with respect to the former does not by itself alert the trial judge with respect to the latter. *Bennett v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1350-06, 09/26/07].

#### **JURY INSTRUCTIONS – REQUESTS**

A trial judge is not required to mull over all the evidence introduced at trial in order to determine whether a defendant's request for a jury instruction means more than it says. *Bennett v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1350-06, 09/26/07].

#### **PRESERVATION OF ERROR – EFFECT OF OBJECTION**

Magic words are not required; a complaint will be preserved if the substance of the complaint is conveyed to the trial judge. *Bennett v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1350-06, 09/26/07].

#### **INSTRUCTIONS – REQUESTS**

A defendant must request defensive instructions before that issue may be considered as law applicable to the case and must be submission to the jury. *Bennett v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1350-06, 09/26/07].

*Blacklock v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1639/1640-06, 09/26/07].

HERVEY, J., *delivered the opinion of the unanimous Court.*

**FACTS:** After being convicted in 1995 for aggravated sexual assault, defendant filed motion for post-conviction DNA testing. The appellate court affirmed the district court's denial of defendant's motion. On petition for discretionary review, the Court of Criminal Appeals reversed the judgment of the court of appeals and remanded to the trial court for further proceedings. The CCA held that victim's trial testimony that she knew and identified defendant as the perpetrator was irrelevant as to whether identity was an issue. Defendant was entitled to DNA testing.

#### **POST-CONVICTION RELIEF – DNA TESTING**

A defendant establishes his right to post-conviction DNA testing once he shows that exculpatory DNA results would establish his innocence. This principal applies even when a defendant conceded the

issue of identity at trial by pleading guilty. *Blacklock v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1639/1640-06, 09/26/07].

*Ex Parte Lindsey*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,417 & 75,418, 09/26/07].

*Per Curiam*.

**FACTS:** Defendant was convicted in 1997 of aggravated assault and burglary of a habitation. In 2003, TDCJ released defendant on mandatory supervision. When TDCJ revoked his supervision, defendant filed petition for writ of habeas corpus. Defendant challenged TDCJ's determination that he was ineligible for mandatory release and its denial of street-time credit. On remand from the CCA, the trial court found applicant was eligible for mandatory supervision and was entitled to relief. The Court of Criminal Appeals granted in part and denied in part. The CCA held that: 1) defendant's eligibility for release to mandatory supervision is governed by the law in effect at the time the offense was committed; 2) defendant was eligible for mandatory release because of the law in effect at the time of his conviction for third-degree aggravated assault; 3) defendant's conviction for first-degree burglary of habitation with intent to commit felony other than theft (sexual assault) rendered defendant ineligible for mandatory release; and 4) because defendant had not completed one-half of his mandatory release period before he was revoked, he was not entitled to street-time credit for time served.

#### **PAROLE – STATUTORY PROVISIONS**

The law in effect at the time the offense was committed determines a defendant's eligibility for mandatory release. *Ex Parte Lindsey*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-75,417 & 75,418, 09/26/07].

*Campbell v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0404-07, 09/26/07].

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

**FACTS:** The trial court convicted defendant of possession of cocaine in drug-free zone and assessed a sentence (enhanced by two prior convictions) of thirty-five (35) years. The court of appeals reversed and remanded for resentencing. On State's PDR, the Court of Criminal Appeals reversed the judgment of the court of appeals. The CCA held that, for sentencing purposes, the trial court's statement at sentencing that possession of cocaine in drug-free zone was "state jail felony" did not warrant modification of judgment to reflect lesser offense of possession of cocaine.

***Delao v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0067-07, 09/26/07].**

HERVEY, J., *delivered the opinion of the unanimous Court.*

**FACTS:** A jury convicted defendant of capital murder and sentenced him to life in prison. When delivering the charge to the jury, the trial court instructed the jury not to consider defendant's confession if they believed it was not made voluntarily. The court of appeals affirmed. The Court of Criminal Appeals affirmed the court of appeals, holding that the appropriate standard for a court to use when reviewing the voluntariness of a confession by a defendant suffering from mental retardation and / or mental illness is the "totality of the circumstances" standard of review.

**EVIDENCE – MOTION TO SUPPRESS – VOLUNTARY CONFESSION**

The trial court is the sole and exclusive trier of fact and judge of the credibility of the witnesses and the evidence presented at a hearing on a motion to suppress, particularly where the motion is based on the voluntariness of a confession. ***Delao v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0067-07, 09/26/07].**

**EVIDENCE – CONFESSION – STANDARD OF REVIEW**

Great deference is accorded to the trial court's decision to admit or exclude a defendant's confession, which will be overturned on appeal only where a flagrant abuse of discretion is shown. ***Delao v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0067-07, 09/26/07].**

**EVIDENCE – VOLUNTARINESS – CONFESSION – MENTAL RETARDATION - REVIEW**

The appropriate standard for reviewing the voluntariness of a confession, whether given by someone of normal mentality or suffering from mental retardation or mental illness, is the totality of the circumstances standard of review. ***Delao v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0067-07, 09/26/07].**

**EVIDENCE – VOLUNTARINESS - CONFESSION**

The statements of a person accused of a crime may be used in evidence against him if it appears that the statements were freely and voluntarily made without compulsion or persuasion. ***Delao v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0067-07, 09/26/07].**

**VOLUNTARY CONFESSION – TOTALITY OF THE CIRCUMSTANCES – JUVENILES**

Totality-of-the-circumstances standard of review is used to review juvenile confessions. Juveniles, because of factors arising from their minority, including but not limited to their lack of education and undeveloped reasoning capacity may be more susceptible to persuasion or underhanded interrogation tactics. ***Delao v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0067-07, 09/26/07].**

### **CONFESSION – VOLUNTARINESS - TOTALITY OF THE CIRCUMSTANCES – JUVENILES**

The totality approach mandates inquiry into all the circumstances surrounding the interrogation, including evaluation of the juvenile's age, experience, education, background, and intelligence, and as to whether he has the capacity to understand the warnings given to him. *Delao v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0067-07, 09/26/07].

### **CONFESSION – MENTAL IMPAIRMENT**

Juveniles and individuals suffering from mental retardation or mental illness share many of the same characteristics. Among other things, they commonly have less education, experience, self-sufficiency, and reasoning abilities than the average adult. A standard of review that is sufficient to encompass all the factors regarding the voluntariness of a minor's confession would also be appropriate to use when evaluating the confession of a mentally retarded or mentally ill defendant. *Delao v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0067-07, 09/26/07].

### **VOLUNTARY CONFESSION – TOTALITY OF THE CIRCUMSTANCES**

The totality of the circumstances standard has been held to be sufficiently all-encompassing to protect the rights of juveniles and adults alike and takes into account such factors as intelligence, age, experience, education, and maturity. Because a confessor's mental capabilities is but one of many factors, this measure of voluntariness may be applicable to confessions made by anyone, regardless of IQ. *Delao v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0067-07, 09/26/07].

*Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

KEASLER, J., *delivered the opinion of the unanimous Court*. PRICE, J., *filed a concurring opinion in which JOHNSON and COCHRAN, JJ., joined*.

**FACTS:** A jury convicted defendant of indecency with a child by contact. The court of appeals affirmed. On defendant's PDR, the Court of Criminal Appeals reversed and remanded to the court of appeals for a harm analysis. The CCA held that jury unanimity was required with regard to whether defendant committed the offense of indecency by touching victim's breasts or genitals.

### **VERDICT – UNANIMITY REQUIREMENT**

Jury unanimity is required in all criminal cases. Unanimity ensures that all jurors reach a consensus “on the same act for a conviction.” To discern what a jury must be unanimous about, appellate courts examine the statute defining the offense to determine whether the Legislature created multiple, separate offenses, or a single offense with different methods or means of commission. *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

## **VERDICT – UNANIMITY**

Jury unanimity is required on the essential elements of the offense but is generally not required on the alternate modes or means of commission. *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

## **VERDICT – UNANIMITY – JURY INSTRUCTIONS**

The unanimity requirement is not violated when the jury has the option of choosing between alternative modes of commission. Different modes of commission may be presented in a jury instruction in the disjunctive when the charging instrument, in a single count, alleged the different means in the conjunctive. *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

## **GRAVAMEN OF OFFENSE – PARSING THE STATUTE**

To identify the essential elements or gravamen of an offense and the alternate modes of commission, if any, the Court of Criminal Appeals recommends diagramming the statutory text according to the rules of grammar. At a minimum, the essential elements of an offense are: (1) the subject (generally the defendant); (2) the main verb; (3) “the direct object if the main verb requires a direct object (ex. the offense is a result-oriented crime); (4) the specific occasion; and (5) the requisite mental state. The means or commission or nonessential unanimity elements are generally set out in adverbial phrases that describe how the offense was committed. (Such phrases are commonly preceded by the preposition “by”). *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

## **INDECENCY WITH A CHILD – SEXUAL CONTACT – DEFINITION**

The offense of indecency with a child by contact criminalizes three separate types of sexual conduct: 1) touching the anus, 2) touching the breast, and 3) touching the genitals with the requisite mental state. Each act constitutes a *different criminal offense* and juror unanimity is required as to the commission of any one of these acts. *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

## **VERDICT – UNANIMITY – REVIEW**

An appellate court must examine the statute defining an offense to determine whether the Legislature “created multiple, separate offenses, or a single offense” with different methods or means of commission before it can determine what unanimous findings a jury must reach. *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

### **VERDICT – UNANIMITY – ALTERNATE MODES OF COMMISSION**

The unanimity requirement is not violated when the jury has the option of choosing between alternative modes of committing an offense. A jury instruction may present different modes of commission in the disjunctive when a single count in the charging instrument alleges different means of commission in the conjunctive. *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

### **GENERAL VERDICT – UNANIMITY – ALTERNATE MODES OF COMMISSION**

A jury may issue a general verdict where different modes of commission are submitted in the disjunctive and there is sufficient evidence to support either mode of commission. *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

### **AGGRAVATED SEXUAL ASSAULT – SEPARATE TRANSACTIONS**

The Legislature, through the language of the statute, has rejected grouping aggravated sexual assaults by transaction. *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

### **INDECENCY WITH A CHILD – SEXUAL CONTACT – SEPARATE OFFENSES**

The offense of indecency with a child by contact is completed when a person commits any one of the three proscribed acts with the requisite intent. If the person touches the anus, breasts, and genitals of a child during the same transaction, the person is criminally responsible for three separate offenses. *Pizzo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-1675-05, 09/26/07].

***!Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07]. !**

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

**FACTS:** A jury convicted defendant of possession of between four and 200 grams of cocaine. The court of appeals affirmed and the Court of Criminal Appeals affirmed. *Abrogating Rogers v. State, Chapa v. State, and Arnold v. State*, the CCA held that at the guilt phase of trial, the trial court was not required to *sua sponte* give a jury instruction on the state's burden of proof for extraneous offenses.

### **JURY CHARGE – OBJECTION – REVERSIBLE ERROR – EGREGIOUS HARM**

If the defendant fails to object or request an instruction before the trial court reads the charge to the jury, then the charge error is reversible *only* if it causes egregious harm to the defendant. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

### **JURY CHARGE – PURPOSE**

The purpose of the jury charge is to inform the jury of the applicable law and guide them in its application to the case. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

### **JURY CHARGE – PURPOSE**

It is not the function of a jury charge to merely avoid misleading or confusing the jury. The jury charge should guide the jury and prevent confusion. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

### **JURY CHARGE – DUTY OF JUDGE**

A trial judge is ultimately responsible for the accuracy of a jury charge and accompanying instructions. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

### **JURY CHARGE – DUTY OF JUDGE**

A trial judge must ensure that all of the law applicable to the criminal offense that is set out in the indictment or information is incorporated into the jury charge. The judge has a *sua sponte* duty to act without any request or objections from the parties to ensure that the jury charge also includes the general admonishments, including, but not limited to the presumption of innocence, proof beyond a reasonable doubt, and the necessity of a unanimous verdict. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

### **JURY CHARGE – DUTY OF JUDGE – DEFENSIVE ISSUES**

While a trial judge has an absolute *sua sponte* duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged, it does not inevitably follow that he has a similar *sua sponte* duty to instruct the jury on all potential defensive issues, lesser-included offenses, or evidentiary issues. Those issues frequently depend upon trial strategy and tactics and should be proffered by the parties. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

### **JURY INSTRUCTION – DUTY OF JUDGE – LESSER INCLUDED OFFENSES**

If neither side requests a jury instruction on a lesser-included offense, the trial court need not submit one *sua sponte*. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE – LIMITING INSTRUCTION**

Once evidence has been admitted without a limiting instruction, it is part of the general evidence and may be used for all purposes. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE – LIMITING INSTRUCTION – BURDEN OF PROOF**

Even when a party properly requests a limiting instruction at the time the evidence is first offered, the trial judge need not give an instruction on the burden of proof at that time. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE - EXTRANEOUS-OFFENSE – LIMITING INSTRUCTION**

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. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE - EXTRANEOUS-OFFENSE – LIMITING INSTRUCTION – BURDEN OF PROOF**

When a defendant has properly requested a limiting instruction be included in the guilt-stage jury charge, the trial court must also include an instruction on the state's burden of proof at that time. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE - - EXTRANEOUS-OFFENSE - PUNISHMENT**

During the punishment phase of a non-capital trial, extraneous-offense evidence may be offered for any relevant purpose, including proof of the defendant's character or propensity. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE – EXTRANEOUS OFFENSE - SENTENCING PHASE**

Regardless of the plea and whether the punishment is to be assessed by the judge or the jury, the state and the defendant may offer evidence as to any matter the court deems relevant to sentencing. Relevant evidence may include, but is not limited to: 1) the defendant's prior criminal record, 2) his general reputation, 3) his character, 4) opinions regarding his character, 5) the circumstances of the offense for which he is being tried, and 6) any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act (notwithstanding Rules 404 and 405, Texas Rules of Evidence). *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE – EXTRANEOUS OFFENSE - PUNISHMENT PHASE**

Extraneous offense evidence is admissible for any relevant purpose during the punishment phase, but only if the State can offer proof that would allow a reasonable fact-finder to conclude, beyond a reasonable doubt, that the defendant could be held criminally responsible for that act. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE – EXTRANEOUS OFFENSE - PUNISHMENT PHASE – INSTRUCTIONS**

A trial judge must *sua sponte* instruct a jury at the punishment phase of a non-capital trial about the law on the use of extraneous-offense evidence, including the fact that the state must prove any extraneous offenses beyond a reasonable doubt. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE – SAME TRANSACTION – NO LIMITING INSTRUCTIONS**

When evidence is admitted as “same transaction contextual evidence,” that is- events and circumstances that are intertwined, inseparable parts of an event that, if viewed in isolation, would make no sense at all, the other-acts rule is not implicated. In such a situation, the defendant is not entitled to any limiting instruction concerning the use of that evidence. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

#### **EVIDENCE - EXTRANEOUS OFFENSE – LIMITING INSTRUCTIONS**

During the guilt phase of trial, a trial court is not required to instruct the jury *sua sponte* on the burden of proof to be used when considering evidence of an extraneous offense. *Delgado v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [PD-0203-07, 09/26/07].

*Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

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

**FACTS:** A jury convicted defendant of capital murder of an individual under six years of age and sentenced him to death. On direct appeal, the Court of Criminal Appeals affirmed. The CCA held that: 1) photographs of the dead three-year-old victim taken during the medical examiner's investigation were admissible; 2) defendant failed to show he was actually prejudiced by the trial court's denial of his motion for a continuance; 3) the evidence was sufficient to support jury's determination that defendant was not mentally retarded for purposes of Atkins (which holds that it is unconstitutional to execute one who is mentally retarded); 4) when issue of mental retardation is presented at trial, defendant bears burden of proof, by a preponderance of evidence, to establish that he is mentally impaired; and 5)

defendant's challenge to the use of pancuronium bromide in the lethal-injection procedure was not ripe for review.

#### **EVIDENCE – PHOTOGRAPHS**

The admissibility of a photograph is within the sound discretion of the trial judge. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **EVIDENCE – PHOTOGRAPHS**

Generally, a photograph is admissible if verbal testimony as to matters depicted in the photographs is also admissible. If verbal testimony is relevant, photographs of the same are also relevant. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **EVIDENCE - EXCLUSION – UNFAIR PREJUDICE**

The Rule which allows otherwise relevant evidence to be excluded when the danger of unfair prejudice substantially outweighs its probative value favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **EVIDENCE – PHOTOGRAPHS – EXCLUSION - PROBATIVE VALUE**

A court may consider several factors in determining whether the probative value of photographs is substantially outweighed by the danger of unfair prejudice. These factors include, but are not limited to: 1) the number of exhibits offered; 2) their gruesomeness; 3) their detail; 4) their size; 5) whether they are black and white or color; 6) whether they are close-up; 7) whether the body depicted is naked or clothed; and 8) availability of other means of proof. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **MOTION FOR CONTINUANCE – REVIEW – ABUSE OF DISCRETION**

Appellate courts review a trial court's ruling on a motion for continuance using the abuse of discretion standard of review. To establish an abuse of discretion, there must be a showing that the court's denial of the motion for continuance actually prejudiced the defendant. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **MOTION FOR CONTINUANCE – PREJUDICE – REVIEW**

A bare assertion that counsel did not have adequate time to interview the State's potential witness does not alone establish prejudice. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

### **SCIENTIFIC EVIDENCE – EXPERT WITNESS**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

### **SCIENTIFIC EVIDENCE – RELEVANCY**

The proponent of scientific evidence must show, by clear and convincing proof, that the evidence is sufficiently relevant and reliable to assist the jury in accurately understanding other evidence or in determining a fact in issue. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

### **SCIENTIFIC EVIDENCE – RELIABILITY**

The reliability of “soft” science evidence may be established by showing that: (1) the field of expertise involved is a legitimate one; (2) the subject matter of the expert's testimony is within the scope of that field; and (3) the expert's testimony properly relies upon or utilizes the principles involved in that field. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

### **SCIENTIFIC EVIDENCE – EXPERT TESTIMONY - ADMISSIBILITY – REVIEW**

A trial court's ruling on the admissibility of the scientific expert testimony is reviewed under an abuse of discretion standard. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

### **PERMISSIBLE JURY ARGUMENTS**

Permissible jury argument falls into one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

### **IMPROPER JURY ARGUMENT**

Argument that strikes at a defendant over the shoulders of defensive counsel is improper. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

### **HARMLESS ERROR ANALYSIS**

Appellate courts conduct a harm analysis using the following three-factor test: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the

certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **INSTRUCTIONS INVADING PROVINCE OF JURY – EVIDENCE**

An instruction that focuses on a particular factor that may render a statement involuntary is an impermissible comment on the weight of the evidence. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **MENTAL RETARDATION – DEATH PENALTY**

It is unconstitutional to execute one who is mentally retarded. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **MENTAL RETARDATION – DEFINITION – DEATH PENALTY**

It is unconstitutional to execute an individual who is mentally retarded. Mental retardation is defined as a disability characterized by: 1) “significantly subaverage” general intellectual functioning; 2) accompanied by “related” limitations in adaptive functioning; 3) the onset of which occurs prior to the age of 18. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **MENTAL RETARDATION – DEATH PENALTY**

In weighing evidence as indicative of mental retardation, fact finders should focus on factors that include, but are not limited to: 1) whether those who knew the person best during developmental stage think he was mentally retarded at that time; 2) whether the person formulated plans and carried them through or is impulsive; 3) whether the person's conduct shows leadership or he is led around by others; and 4) whether the person responds coherently, rationally, and on point to oral or written questions. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **MENTAL RETARDATION – DEATH PENALTY – HABEAS ACTION**

In a habeas action, a petitioner who has been sentenced to death has the burden to prove he is mentally retarded by a preponderance of the evidence. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **EVIDENCE - MENTAL RETARDATION – BURDEN OF PROOF**

When the issue of mental retardation is presented at trial, the defendant bears the burden of proof to establish he is mentally retarded by a preponderance of the evidence. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **EVIDENCE – SUFFICIENCY - MENTAL RETARDATION – STANDARD OF REVIEW**

In evaluating the sufficiency of the evidence to support a jury's determination that a defendant is not mentally retarded, appellate courts must consider *all* of the evidence relevant to the issue and evaluate whether the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **MISTRIAL / CONTINUANCE – REVIEW – ABUSE OF DISCRETION**

Appellate courts review a trial court's denials of motions for mistrial and continuance under an abuse of discretion standard. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **MENTAL RETARDATION – DEATH PENALTY – JURY DETERMINATION**

The ultimate issue of whether a defendant is mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, must be based upon *all* of the evidence and determinations of credibility. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **DEATH PENALTY – JURY INSTRUCTIONS – RESIDUAL DOUBT**

There is no constitutional right to have jurors' residual doubts about the defendant's guilt be considered as a mitigating factor during deliberations in a capital murder case. Furthermore, there is no constitutional right to a jury instruction regarding residual doubt. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].

#### **DEATH PENALTY – LETHAL INJECTION PROCEDURE – REVIEW**

If a defendant's execution is not imminent, his challenge of the use of pancuronium bromide in Texas' lethal-injection procedure is not ripe for review. The method in which the lethal injection is currently administered is not determinative of the way it will be administered at the moment of defendant's execution. *Gallo v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2007) [AP-74,900, 09/26/07].