
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, ELIZABETH WIEHLE, AND MARY MARTIN
SUBJECT: 11/21/07 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 01/14/08
CC: JACK THOMPSON

***Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-0236-07; 11/21/07].**

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

FACTS: A jury convicted defendant of capital murder and sentenced him to life imprisonment. Defendant was charged, tried, and convicted of murdering his former girlfriend and her four to six week old fetus. Finding the unborn victim statute to be constitutional, the court of appeals affirmed the judgment. The Court of Criminal Appeals affirmed the court below.

STATUTORY ANALYSIS—PRESUMPTION OF CONSTITUTIONALITY

When a court considers the constitutionality of a statute, it must first presume that the legislature has not acted unconstitutionally. ***Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].**

STATUTORY ANALYSIS—VOID FOR VAGUENESS

A statute is void for vagueness if it fails to define a criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited; furthermore, the statute must be capable of being defined in a manner that does not permit arbitrary and discriminatory enforcement. ***Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].**

STATUTORY ANALYSIS—VOID FOR VAGUENESS

A statute is valid unless it is impermissively vague in all applications and does not substantially implicate constitutionally protected conduct or speech. ***Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].**

CAPITAL MURDER—MULTIPLE MURDERS / SINGLE TRANSACTION

A person commits capital murder when that individual intentionally or knowingly causes the death of more than one person during a single criminal transaction. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].

DEFINITIONS—INDIVIDUAL

The Texas Penal Code defines an “individual” as a human being who is alive. This includes an unborn child at any stage of gestation from fertilization to birth. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].

CAPITAL MURDER—PREGNANT / UNBORN VICTIMS

A person commits capital murder when that individual intentionally or knowingly causes the death of a woman and her unborn child at any stage of gestation. Specifically excluded from the terms of the statute are women who choose to terminate their own pregnancies. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].

CONSTITUTIONAL ANALYSIS—UNBORN VICTIMS STATUTE

Because the unborn victims statute leaves no ambiguity as to what conduct is proscribed, no ordinary person reading the statute would have any doubt as to whether it encompasses victims at all stages of gestation. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].

MOTION TO QUASH INDICTMENT—PROCEDURE

A defendant cannot use a motion to quash an indictment to argue that the prosecution cannot prove one of the elements of a crime. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07] ; 11/21/07]

PRETRIAL PROCEDURE—SUFFICIENCY OF THE EVIDENCE

Pre-trial proceedings should not be “mini-trials” on the sufficiency of the evidence to support an element of the offense. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].

INDICTMENTS—CONSTITUTIONAL NOTICE REQUIREMENT

To satisfy constitutional notice requirements, an indictment must be specific enough to inform the accused of the nature of the charges against him so that he may prepare a defense. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].

INDICTMENTS—SPECIFICITY

When a statute meets constitutional specificity, an indictment following that statute provides adequate notice to a defendant to prepare a defense. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].

CAPITAL MURDER—UNBORN VICTIM – DISTINGUISHED FROM *ROE V. WADE*

The “Compelling State Interest” test and the viability threshold created in *Roe v. Wade* have no application to a statute that prohibits a third party from intentionally causing the death of a woman and her unborn child. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].

CAPITAL MURDER— DUE PROCESS

In the absence of a due process interest triggering the constitutional protections of *Roe v. Wade*, the Texas Legislature is free to protect the lives of those that it considers to be human beings. *Lawrence v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0236-07; 11/21/07].

Robinson v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1369-05; 11/21/07].

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

FACTS: Defendant was convicted of aggravated assault with a deadly weapon. Immediately after trial, defendant filed notice of appeal and the court appointed counsel to represent him on appeal. Five days later, Defendant filed a *pro se* motion for a new trial, which the court denied without a hearing. The court of appeals affirmed. The Court of Criminal Appeals reversed and remanded to the court of appeals with instructions to determine whether the trial court intended to deny the motion for new trial because the motion was filed *pro se* or whether the denial was on the merits.

PRO SE MOTIONS—HYBRID REPRESENTATION

There is no right to hybrid representation. “Hybrid representation” is defined as representation partly by counsel and partly by the party. *Robinson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1369-05; 11/21/07].

PRO SE MOTIONS—HYBRID REPRESENTATION

Because there is no right to hybrid representation, a trial court is free to disregard any *pro se* motions presented by a defendant who is represented by counsel. *Robinson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1369-05; 11/21/07].

PRO SE MOTIONS—TRIAL COURT MAY PERMIT HYBRID REPRESENTATION

If a trial court considers and rules on a *pro se* motion filed while the defendant is represented by an attorney, the court essentially allows the defendant hybrid representation for that one motion. Once the court does so, the motion filed *pro se* by the defendant is as valid and effective as any motion filed by his attorney. Accordingly, if a court *rules* on a *pro se* motion even though it did not have to consider the motion, its ruling is subject to review on appeal. *Robinson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1369-05; 11/21/07].

Cooks v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0010-06; 11/21/07].

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

FACTS: Defendant pleaded guilty to aggravated assault with a deadly weapon and the court sentenced him to fifteen years in prison. Defendant’s trial counsel properly filed a notice of appeal, but was not retained for the appeal. Ten days before the motion for a new trial was due, the trial court appointed appellate counsel. Four months later, defendant filed “A Motion to Abate Appeal to File Out-of-Time Motion for a New Trial.” The court of appeals denied his motion. On appeal, defendant argued: 1) that there was not enough time to make a competent decision as to whether to pursue a new trial, and 2) that the denial of his request for an extension of time amounted to constructive denial of counsel during a critical phase of his defense. The court of appeals affirmed the trial court’s decision. The Court of Criminal Appeals (CCA) also affirmed. The CCA held that, although the 30 day period to move for a new trial is a critical stage of his defense, the denial of counsel did not prejudice the defendant.

DENIAL OF COUNSEL—CRITICAL STAGE OF THE DEFENSE

A hearing on a motion for a new trial is a critical stage of a criminal proceeding.

Cooks v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0010-06; 11/21/07].

RIGHT TO COUNSEL—INDIGENT DEFENDANTS

Appointed counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of the criminally accused may be affected. *Cooks v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0010-06; 11/21/07].

RIGHT TO COUNSEL—APPEAL

The defendant's initial appeal of right is a critical stage of a criminal proceeding and requires appointment of counsel for indigent defendants. *Cooks v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0010-06; 11/21/07].

PRESERVATION OF ERROR—MOTION FOR A NEW TRIAL—RIGHT TO COUNSEL

A motion for a new trial is not usually necessary to preserve an error for appeal; however, it is sometimes required as a necessary step to adduce facts otherwise not in the record for use on appeal. *Cooks v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0010-06].

MOTION FOR NEW TRIAL—CRITICAL STAGE—RIGHT TO COUNSEL

The substantial right of a defendant to preserve issues for appeal is at stake during the 30 day period to move for a new trial. As a result, this is a critical stage of the proceedings and a defendant has a constitutional right to counsel during the 30 days. *Cooks v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-0010-06].

DENIAL OF COUNSEL—POST-TRIAL COUNSEL—REBUTTABLE PRESUMPTION

When a defendant is represented by counsel during trial, there is a rebuttable presumption that the trial counsel continued to adequately represent the defendant during the critical 30 day window to move for a new trial. *Cooks v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-0010-06].

REVIEW—POST-TRIAL COUNSEL—HARMLESS ERROR

Even if a defendant can rebut the presumption that the trial counsel continued to adequately represent him after trial, this deprivation of counsel is subject to a harmless error or prejudice analysis. *Cooks v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-0010-06].

REVIEW —DENIAL OF POST-TRIAL COUNSEL—HARMLESS ERROR

Deprivation of counsel during the period for filing a motion for a new trial is not harmless when defendant can assert a “facially plausible claim” that can be presented in a motion for a new trial. *Cooks v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-0010-06].

***Moore v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-003-07].**

PRICE, J., *delivered the opinion for a unanimous Court.*

FACTS: Defendant pleaded guilty to manufacturing methamphetamine in an amount more than four grams, but less than 200 grams. Defendant's plea agreement with the State stipulated that if he committed any criminal offenses during the six weeks before his sentencing, the plea would open to full sentencing by the court. Subsequently, defendant committed an assault in the intervening period and the trial court sentenced him to forty years in prison instead of the twenty-five years stated in the plea agreement. The court of appeals reversed, holding that the trial court erred by not allowing the defendant to withdraw his guilty plea. The Court of Criminal Appeals (CCA) reversed the appellate court and reinstated the judgment of the trial court. The CCA found there was no cause to set aside the trial court's judgment because the defendant and the State knowingly and voluntarily agreed on: 1) the terms of the plea agreement in this case, including the six-week deferment of sentencing, 2) the covenants to appear at the sentencing hearing and not commit a criminal offense during the six-week period, and 3) the potential consequences for breaching either covenant.

PLEA AGREEMENTS—VOLUNTARY/ INTELLIGENT WAIVER

Plea agreements are consistent with the requirements of voluntary and intelligent waiver because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions. A plea agreement is no less voluntary than any other bargained for exchange. ***Moore v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-003-07].**

PLEA AGREEMENTS— CONTRACTS— JUDICIAL INTERFERENCE

Plea agreements are general contractual agreements negotiated between the State and a defendant at arm's length. Both parties are given wide latitude when crafting plea agreements, and judicial interference is only allowed when the terms of the plea agreement appear manifestly unjust. ***Moore v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-003-07].**

PLEA AGREEMENTS—JUDICIAL APPROVAL

A plea agreement is not binding unless the terms are approved by the trial court. If a plea agreement is not approved by the trial court, no plea agreement exists. However, once a plea agreement is accepted by the trial court, both parties are bound to carry out their agreement. ***Moore v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-003-07]**

PLEA AGREEMENTS—REMEDIES

When a plea agreement is breached, there are two remedies: 1) the plea may be withdrawn or 2) the non-breaching party may demand specific performance of the remainder of the plea agreement. *Moore v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-003-07].

PLEA AGREEMENTS—BREACH

Numerous cases have held that when a defendant does not uphold his part of the plea agreement, the trial court may disregard the recommendation of the plea agreement pursuant to the agreement's express terms. *Moore v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-003-07].

Herrera v. State, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

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

FACTS: Defendant was arrested on an outstanding warrant, after being involved in an interracial fight outside a bar in Lockhart, Texas. While defendant was in jail, an officer interviewed him about the fight. The officer, however, did not give the defendant *Miranda* warnings or advise of him of his statutory rights before the interview and did not record the conversation. Defendant was later charged with aggravated assault with a deadly weapon. Before trial, the defendant moved to suppress his statements from this interview, but did not request a pretrial suppression hearing. During trial, defendant objected to the officer's testimony concerning his conversation with the defendant. After allowing the parties to question the officer about the circumstances surrounding the interview, the trial judge overruled the defendant's objection and allowed the testimony. The jury found defendant guilty of one count of aggravated assault with a deadly weapon, and sentenced him to eight years' imprisonment. The court of appeals affirmed, finding defendant was not "in custody" for purposes of *Miranda* when he was interviewed by the officer. The Court of Criminal Appeals also affirmed.

CUSTODIAL INTERROGATION—MIRANDA WARNINGS

The U.S. Supreme Court defines "custodial interrogation" as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Unwarned statements obtained as a result of custodial interrogation may not be used as evidence by the state in a criminal proceeding

during its case-in-chief. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

CUSTODIAL INTERROGATION—MIRANDA WARNINGS

In considering whether someone is in “custody” for *Miranda* purposes, a court applies the “reasonable person” standard: a person is in custody only if, under the circumstances, a reasonable person would believe that their freedom of movement is restrained to the degree associated with a formal arrest. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

CUSTODIAL INTERROGATION—MIRANDA WARNINGS

A court’s custody inquiry includes an examination of all the objective circumstances surrounding the questioning. A court does not consider an official’s subjective beliefs as to whether a person is suspect, unless an official’s subject belief is somehow conveyed to the person. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE— CUSTODIAL INTERROGATION—ADMISSIBILITY

Statements made during a custodial interrogation are admissible against a defendant in a criminal proceeding if, among other things: 1) the statements are electronically recorded; 2) the defendant receives the warnings set out in Section 2(a) before the statements are made and the warnings are included on the recording; and 3) the defendant “knowingly, intelligently, and voluntarily” waives the rights set out in the warnings. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE—CUSTODIAL INTERROGATION—ADMISSIBILITY

During trial, a defendant bears the initial burden of proving that a statement is the product of custodial interrogation. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE— CUSTODIAL INTERROGATION—ADMISSIBILITY

The State bears no burden to show that it complied with *Miranda*, unless or until the record as a whole clearly establishes that a defendant’s statement is the product of a custodial interrogation by a law enforcement agent. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE— CUSTODIAL INTERROGATION—REVIEW

Since a trial judge’s ultimate “custody” determination is a mixed question of law and fact, a reviewing court should afford the trial court almost total deference when questions of

historical facts turn on credibility and demeanor. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE—CUSTODIAL INTERROGATION—REVIEW

When historical fact questions do not turn on credibility and demeanor, a court reviews a lower court’s determination of “custody” *de novo*. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE—CUSTODIAL INTERROGATION—REVIEW

When a trial judge denies a motion to suppress and does not enter findings of fact, a reviewing court will view the evidence in the light most favorable to the trial court’s ruling and will assume that the trial court made implicit findings of fact that support its ruling as those findings are supported by the record. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE—CUSTODIAL INTERROGATION—REVIEW

Miranda warnings may be required when an inmate is questioned by law enforcement officials. The warnings, however, are not required to precede all inmate interrogations because there is no basis for assuming that the coercive aspects of custodial interrogation are present in every instance in which a inmate is questioned by a law enforcement officer. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE—CUSTODIAL INTERROGATION—REVIEW

Incarceration does not always constitute “custody” for *Miranda* purposes, when an inmate is questioned by law enforcement officials regarding an offense separate and distinct from the offense for which a defendant is incarcerated. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE—CUSTODIAL INTERROGATION—REVIEW

A court evaluates “custody” on an *ad hoc* basis by considering all the objective circumstances, and applying the “reasonable person” standard. The reasonable person standard includes two inquiries: 1) what are the circumstances surrounding the interrogation; and 2) given those circumstances, would a reasonable person feel that he or she is not at liberty to terminate and leave the interrogation. *Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].

EVIDENCE—CUSTODIAL INTERROGATION—REVIEW

A court's evaluation of the circumstances surrounding an interrogation includes, but is not limited to: 1) the language used to summon the inmate; 2) the physical surroundings of the interrogation; 3) the extent to which the inmate is confronted with evidence of their guilt; 4) the additional pressure exerted to detain the inmate or the change in the surroundings of the inmate which result in an added imposition on the inmate's freedom of movement; and the inmate's freedom to leave the scene; and 5) the purpose, place, and length of the questioning.

***Herrera v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD- 1986-05, 11/21/07].**

***Collins v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].**

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

FACTS: Defendant pleaded guilty to possession of more than four but less than 200 grams of methamphetamine. Pursuant to a plea agreement accepted by the court, defendant was sentenced to five years' imprisonment with 34 days of pre-sentence jail-time (back-time). Defendant did not file a motion for a new trial or an appeal, but did file a writ of habeas corpus motion after the trial court's plenary power expired. The trial court granted defendant's motion, and its judgment *nunc pro tunc* awarded defendant an additional 271 days of back-time credit that he accrued while in custody in Louisiana. The State appealed. The appellate court vacated the *nunc pro tunc* and reinstated the original judgment. Defendant appealed to the Court of Criminal Appeals (CCA), arguing that: 1) the court of appeals did not have jurisdiction over the State's appeal, and 2) it was proper for the trial court to award back-time credit by judgment *nunc pro tunc*. The CCA affirmed the appellate court's judgment.

JUDGMENT *NUNC PRO TUNC* —REVIEW

The State has a statutory right to appeal a trial court's order if the order modifies the original judgment. ***Collins v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].**

***NUNC PRO TUNC* —APPEAL**

Because sentence and time credit are portions of the judgment, the State may appeal: 1) a *nunc pro tunc* reducing a defendant's sentence or 2) a modification of the amount of "credit for time served" or back-time the defendant receives. ***Collins v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].**

***NUNC PRO TUNC*— REVIEW**

A court of appeals has jurisdiction to hear the State’s appeal from a trial court’s judgment *nunc pro tunc*. *Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].

***NUNC PRO TUNC*— REVIEW**

A judgment *nunc pro tunc* is the appropriate avenue to make a correction when the court's records do not mirror the judgment that was actually rendered. *Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].

***NUNC PRO TUNC* —CLERICAL ERRORS— NOT JUDICIAL ERRORS**

A trial court can use judgment *nunc pro tunc* to fix clerical errors in the records. Errors that are the result of judicial reasoning are not considered clerical errors and a judgment *nunc pro tunc* is not appropriate. *Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].

***NUNC PRO TUNC* —LIMITATIONS**

A trial court cannot enter a judgment *nunc pro tunc* to change a court’s records to reflect what it believes should have been done. *Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].

***NUNC PRO TUNC*— PROOF —PROPOSED JUDGMENT**

Before a judgment *nunc pro tunc* may be entered, there must be proof that the proposed judgment was actually rendered or pronounced at an earlier time. *Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].

***NUNC PRO TUNC* —BACK-TIME AWARDS**

When there is no clerical error in the original judgment, a *nunc pro tunc* is not the proper mechanism to correct a trial court’s failure to award additional back-time. *Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].

***NUNC PRO TUNC*— INCORRECT CALCULATIONS OF TIME**

A judgment *nunc pro tunc* can be used to correct a defendant’s pre-sentence jail time, when there is an incorrect calculation of the amount of the defendant’s back-time award, or a need to adjust the omission of any statutory back-time in the judgment. *Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].

***NUNC PRO TUNC* —FINAL CALCULATIONS**

A judgment *nunc pro tunc* may be used to enter final calculation of back-time, when a defendant negotiated to receive additional back-time credit in his plea-bargain with the State.

***Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].**

***NUNC PRO TUNC* —PRE-SENTENCE JAIL TIME – STATUTORY ENTITLEMENT**

Because a defendant is entitled to all statutory back-time, a judgment *nunc pro tunc* may be used when the amount of pre-sentence jail-time was not a negotiated term of a plea bargain. *Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].

WAIVER- BACK—TIME AWARD

When the facts on record support that waiver occurred, a defendant affirmatively waives his right to pre-sentence jail-time credit by entering into a plea bargain with the State.

***Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].**

PLEA BARGAIN —WAIVER— BACK-TIME AWARD

When a defendant accepts a plea bargain with a specific amount of back-time credit, a defendant waives their statutory right to time served in another jurisdiction, and defendant cannot use judgment *nunc pro tunc* to modify the judgment. *Collins v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1203-06, 11/21/07].

***Clay v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1370-05, 11/21/07].**

HOLCOMB, J., *delivered the opinion of the Court, in which* KELLER, P.J., *and* JOHNSON, KEASLER, HERVEY, *and* COCHRAN, JJ., *joined.* PRICE *and* WOMACK, JJ., *dissented.* MEYERS, J., *did not participate.*

FACTS: A jury found defendant guilty of aggravated robbery and sentenced him to six years' imprisonment and a \$10,000 fine. On appeal, defendant argued that the trial court violated his Sixth Amendment right to confrontation when it admitted a witness's hearsay testimony concerning what defendant's co-actors told the witness and that this error was not harmless beyond a reasonable doubt. The court of appeals reversed. The State appealed to the Court of Criminal Appeals (CCA), arguing that the court of appeals erred in failing to consider all the properly admitted evidence while conducting its harm analysis. The CCA reversed the appellate court and affirmed the trial court's judgment.

EVIDENCE—TESTIMONY ADMISSIBILITY

A "testimonial" hearsay statement is not admissible into evidence against a defendant, unless the declarant is unavailable and the defendant has a prior opportunity to cross-examine the declarant. *Clay v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1370-05, 11/21/07].

EVIDENCE—TESTIMONY ADMISSIBILITY

A statement given during a police interrogation is “testimonial” when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal proceedings. *Clay v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1370-05, 11/21/07].

ADMISSION OF TESTIMONIAL EVIDENCE —REVIEW

A violation of the Confrontation Clause is subject to harmless error analysis. *Clay v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1370-05, 11/21/07].

ADMISSION OF TESTIMONIAL EVIDENCE—REVIEW

A constitutional error requires reversal of the judgment, unless a court determines, beyond a reasonable doubt, that the error did not contribute to the conviction or punishment. *Clay v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1370-05, 11/21/07].

ADMISSION OF TESTIMONIAL EVIDENCE—REVIEW

A court considers the entire record in determining if a trial court’s error contributed to a defendant’s conviction or punishment. *Clay v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1370-05, 11/21/07].

ADMISSION OF TESTIMONIAL EVIDENCE—REVIEW

When a trial court erred in admitting hearsay testimony, a reviewing court considers: 1) the importance of the hearsay evidence to the State’s case; 2) whether the hearsay evidence was cumulative of other evidence; 3) the presence or absence of other evidence corroborating or contradicting the hearsay evidence on material points; and 4) the overall strength of the State’s case. *Clay v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1370-05, 11/21/07].

ADMISSION OF TESTIMONIAL EVIDENCE—REVIEW

A court’s error is harmless when, in the absence of the error, the State’s case is not significantly less persuasive and a jury’s verdict and punishment are the same. *Clay v. State*, _ S.W.3d _ (Tex. Crim. App. 2007) [PD-1370-05, 11/21/07].