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**MEMORANDUM**

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**TO:** JUDGES TRYING CRIMINAL CASES  
**FROM:** DEBORAH SELDEN AND INTERNS LAURA FLYNN AND DIMITRIOS GAKIDIS  
**SUBJECT:** 10/25/06 COURT OF CRIMINAL APPEALS OPINIONS  
**DATE:** 10/31/06  
**CC:** JACK THOMPSON

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***Miles v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-0436-05, 10/25/06].**

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

**FACTS:** At trial, the court sustained state’s objection to defense counsel’s closing argument to the jury that “at this time there is a presumption of innocence throughout the trial.” The court of appeals agreed that the trial court had erred, but that the error was harmless beyond a reasonable doubt and affirmed the trial court’s judgment. Defendant filed petition for discretionary review. The Court of Criminal Appeals affirmed the court of appeals, holding that 1) the trial court committed a classic trial error during jury argument, 2) the error did not rise to the level of a structural error, and 3) the error was subject to a quantitative assessment for harm within the context of the entire trial.

**DUE PROCESS CLAUSE – PRESUMPTION OF INNOCENCE**

Under the Due Process Clause of the Fourteenth Amendment, an accused in state court has the right to the presumption of innocence, *i.e.*, the right to be free from criminal conviction unless the State can prove his guilt beyond a reasonable doubt by probative evidence adduced at trial. ***Miles v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-0436-05, 10/25/06].**

**PRESUMPTION OF INNOCENCE – IN GENERAL**

Telling a jury about the presumption of innocence directs the jury to judge an accused's guilt or innocence **solely** on the basis of the evidence adduced at trial and **not** on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody. ***Miles v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-0436-05, 10/25/06].**

## **PRESUMPTION OF INNOCENCE – DEFENDANT’S RIGHTS**

The presumption of innocence, as it exists in a court of law, is not a presumption at all in the legal sense; the term “presumption of innocence” is merely an inaccurate, shorthand description of the criminal defendant’s right to remain inactive and secure until the prosecution has taken up its burden and produced evidence. *Miles v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-0436-05, 10/25/06].

## **CONSTITUTIONAL ERRORS – HARMLESS ERROR RULE**

The Supreme Court has held that some constitutional errors are so unimportant and insignificant that they may be deemed harmless, and not require automatic reversal of the conviction. Before a federal constitutional error may be deemed harmless, the reviewing court must be able find beyond a reasonable doubt that the error did not contribute to the verdict obtained. In later cases, the Court made it clear that a federal constitutional error may be found harmful if it contributes to the verdict obtained and it **materially affects** the jury's deliberations to the defendant's detriment. *Miles v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-0436-05, 10/25/06].

## **TRIAL ERRORS – HARMLESS ERROR RULE**

The Supreme Court has held that the harmless-error rule is applicable only to trial errors, those isolated and limited errors that occurred during the presentation of the case to the trier of fact. Trial errors may be *quantitatively assessed* in the context of the entire trial. *Miles v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-0436-05, 10/25/06].

## **STRUCTURAL DEFECTS – HARMLESS ERROR RULE**

The harmless-error rule may *not* be applied to structural defects affecting the framework within which the trial proceeds, because such structural defects have inherently indeterminate effects on trial proceedings. *Structural defects* include 1) the total deprivation of the defendant's right to counsel at trial, 2) partiality by the judge presiding over the trial, 3) denial of the right to self-representation at trial, 4) exclusion of members of the defendant's race from the indicting grand jury, and 5) denial of the right to a public trial. *Miles v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-0436-05, 10/25/06].

## **HARMLESS ERROR RULE – TRIAL ERROR**

Before a reviewing court may apply the harmless-error rule to an error, it must decide whether the error is a *trial error* subject to the harmless-error rule. If the appellate record in a criminal case reveals *constitutional error* that is subject to harmless error review, the court of

appeals **must** reverse a judgment of conviction or punishment **unless** the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *Miles v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-0436-05, 10/25/06].

#### **HARMLESS ERROR REVIEW – TOTALITY OF THE CASE**

An appellate court must examine the record as a whole when engaged in a harmless-error review. Indeed, to evaluate the impact of an error upon a jury decision, one must consider the totality of the case before the jury. *Miles v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-0436-05, 10/25/06].

*Kelly v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-1136-05, 10/25/06].

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

**FACTS:** After an automobile accident, defendant was taken to a hospital emergency room for medical treatment. Hospital testing of defendant's blood indicated that her blood-alcohol concentration was above the legal limit. When the police came to the emergency room and asked defendant for a specimen of her blood, she refused. Later, the State obtained defendant's blood-test results from the hospital through a grand-jury subpoena and charged defendant with DWI. After a hearing, the trial court granted defendant's motion to suppress, but did not make any written findings of fact or conclusions of law explaining the factual or legal basis for its ruling. The State appealed. The court of appeals decided that the Fourth Amendment's exclusionary rule did not exclude the subpoenaed hospital blood-test results. The Court of Criminal Appeals affirmed the judgment of the court of appeals, holding that defendant's acquiescence to hospital personnel's request to blood draw constituted consent.

#### **RULING ON MOTION TO SUPPRESS –REVIEW DE NOVO**

In reviewing a trial court's ruling on a motion to suppress, an appellate court must view the evidence in the light most favorable to the trial court's ruling. When a trial court makes explicit fact-findings, the appellate court determines whether the evidence (viewed in the light most favorable to the trial court's ruling) supports these fact-findings. The appellate court then reviews the trial court's legal ruling *de novo* unless the trial court's supported-by-the-record explicit fact-findings are also dispositive of the legal ruling. *Kelly v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-1136-05, 10/25/06].

### **RULING ON MOTION TO SUPPRESS – NO FACT FINDINGS – REVIEW DE NOVO**

In the absence of the reasons for trial court's ruling on the record or in written findings, the appellate court implies the necessary fact findings that would support the trial court's ruling if the evidence (viewed in the light most favorable to the trial court's ruling) supports these implied fact findings. The appellate court will then review the trial court's legal ruling *de novo* unless the supported-by-the-record implied fact-findings are also dispositive of the legal ruling. *Kelly v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-1136-05, 10/25/06].

### **NONPERSUASION RISK**

In reviewing a ruling on a motion to suppress, appellate courts should be mindful that the party with the burden of proof assumes the risk of nonpersuasion. If the party with the burden of proof loses at the trial and the trial court makes no explicit fact-findings, then the party should most likely lose on appeal. *Kelly v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-1136-05, 10/25/06].

### **MERE ACQUIESCENCE – CONSENT**

An express or implied finding of “mere acquiescence” to blood draw, would also constitute a finding of consent. *Kelly v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-1136-05, 10/25/06].

### **ACQUIESCENCE – EFFECTIVE CONSENT**

Defendant does not have to be told that she can refuse to consent to having her blood draw for her acquiescence to be considered a valid consent. While knowledge of the right-to-refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. *Kelly v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2006) [PD-1136-05, 10/25/06].